THE CENTRAL LAW JOURNAL.

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, AUGUST 18, 1876. { Hon. JOHN F. DILLON Contributing Editor.

Current Topics.

THE SUPREME COURT OF MISSOURI.—One of the worst features of our judicial system is, that succession to the judicial bench is made to depend upon the action of political caucuses. One of those caucuses in this state has put forth a platform ringing throughout with the cry of reform, and then has committed an act worthy of the worst days of machine politics, by nominating for the office of judge of the supreme court a new and untried man in place of one of the ablest and best judges that has sat on that bench since its creation. We do not propose to enter into a political discussion, but we propose to speak our views plainly in regard to this matter. And we say that men are judged by their actions and not by their words, and that when a political convention commits an act of this kind, and then cries "reform, reform," its cry of reform is a false pretence. It is a shame that the election of a judge should be made a party question. It is a still greater shame that that miserable maxim of American politics "to the victors belong the spoils," should ever have assailed the judicial bench and threatened its independence. While a reform party is putting forward a purely party candidate for the supreme bench, the people, in some of their local conventions, are exhibiting a disrespect for that court worthy of French communists. A body of citizens in Morgan County the other day met and resolved to repudiate a certain portion of their funded county indebtedness, and, among other resolutions, adopted the following: "Resolved, The decisions of our state supreme court on these bond questions are without precedent, and are unjust, partial to the bondholder, and are utterly subversive of natural rights, and should not be respected by the people of Missouri in this behalf." A stronger argument than this resolution could not be put forth, not only in favor of the independence of the judiciary from the influence of popular clamor, but also in favor of its independence of party politics. A political convention which met at Jefferson City on the 9th instant did itself honor in re-nominating Hon. David Wagner to the position he now holds. We sincerely hope that the voters of Missouri will see the propriety of viewing the claims of the two candidates solely with reference to their respective merits and services, and not from a party standpoint.

JURISDICTION OF UNITED STATES CIRCUIT COURTS.—BANKRUPTCY PROCEEDINGS IN ANOTHER STATE.—In the case of Burbank *et al.* v. Bigelow *et al.*, decided at the last term of the United States Supreme Court, the plaintiff, as executrix of her deceased husband, had filed a bill of complaint in the Circuit Court of the United States for the District of Louisiana for an account of a certain partnership which she alleged existed between her husband and the defendant, a citizen of Wisconsin, and prayed that he should account for, as part of the partnership assets, the proceeds of a certain judgment for $13,864.34, which he had recovered in his individual name against one Edward Burbank, in 1866, in said circuit court. She alleged that the judgment was for a debt due the partnership, and should be applied to the payment of the partnership debts, a portion of which, to a large amount, was pressing against her husband's estate. The circuit court refused to pass upon the merits of the case, but dismissed the bill for want of jurisdiction, on the ground, that the defendant Bigelow, together with one Hancock, a former partner of his, shortly before the filing of the bill in this case, filed their joint petition in the District Court of the United States for the District of Wisconsin, to be declared bankrupts, and a decree of bankruptcy was rendered against them on the 23d day of January, 1869; but no assignment was made by the bankrupts until the 11th of February, 1869 (three days after filing the bill), when an assignment was made to one McDougall, of Wisconsin. In his schedule of assets in bankruptcy, Bigelow refers to the judgment recovered by him against Burbank, but states that it had been assigned for the benefit of creditors. The court on these facts considered that the controversy belonged exclusively to Wisconsin, as an incident to the proceedings in the bankruptcy of Burbank, and although it might have jurisdiction of the parties, it had not of the cause.

The Supreme Court of the United States reversed this decision of the circuit court, and remanded the case to be heard on the merits. The court held that no possible advantage could be gained by sending the parties to Wisconsin to litigate the questions raised in the suit. A right of property is controverted. The complainant contends that the fruits of the judgment recovered by Bigelow, the bankrupt, against Burbank belong to the firm of which her husband was a partner. The bankrupt and his assignees deny this. It is a controversy the determination of which is clearly embraced within the jurisdiction conferred upon the circuit courts by the second clause of section 2 of the original bankrupt act, now, section 4,979 of the Revised Statutes. This court recently decided, in the case of Lathrop v. Drake, 3 Cent. Law Journal, 414, that this jurisdiction may be exercised by any circuit court having jurisdiction of the parties, and is not confined to the court of the district in which the decree of bankruptcy was made. Therefore, the time when the bankruptcy occurred or when the assignment was made is totally immaterial. The court, under the bankrupt act, has jurisdiction of the cause as between the assignee in bankruptcy and, the complainant, without reference to the citizenship of the parties. As between the other parties and the complainant, of course citizenship is material. But no objection to the jurisdiction exists on that account in point of the fact; as residence of the parties is such as is required in order to give it. Therefore, though the suit had not been commenced until after the appointment of the assignee and after the assignment to him, the complainant might still have instituted the suit in the Circuit Court in Louisiana, if process could have been served upon the defendants. But, inasmuch as the parties were citizens of different states, she might have done this without the aid of the section referred to. It was recently held, in the case of Eyster v. Gaff, 3 Cent. Law Journal, 250, that the bankrupt law has not deprived the state courts of jurisdiction over suits brought to decide rights of property between the bankrupt (or his assignee) and third persons; and whenever the state courts have jurisdiction, the Circuit Courts of the United States have it, if the proper citizenship of the parties exists. In the case last referred to, a suit to foreclose a mortgage was commenced before the mortgagor went into bankrutcy, but the decree was not rendered until after that event and the appointment of an assignee. It was decided that the validity of the suit or of the decree was not affected by the intervening bankruptcy; that the assignee might or might not be made a party; and whether he was or not, he was equally bound with any other party acquiring an interest *pendente lite*.

—ON Wednesday evening last Congress finally adjourned till December next.

NEWSPAPER REPORTS OF LEGAL PROCEEDINGS.—A correspondent, whose letter we print elsewhere, directs our attention to a mistake of fact into which we fell in our issue of August 4, in an editorial on "Attachment Laws." His explanation of the case is no doubt the correct one, and we are obliged to him for setting us right. The whole trouble arose from our following a report of the affair which appeared in the columns of a morning newspaper, published in this city. The proceedings of the inferior city courts are only to be found in these papers, and consequently we have sometimes been forced to take them as authority. Experience has, at length, taught us that such a practice is dangerous, and we shall follow it no longer. Those daily and weekly newspapers which occasionally report the transactions of the courts, usually employ their general local reporters, men who are not lawyers, have never had a legal training, and who have about the same idea of the distinction between a bond and a writ, that the apprentice in Pickwick had of the difference between oxalic acid and epsom salts. It is less than a fortnight since the New York *Commercial Advertiser*, a paper which pretends to report the proceedings of the courts, contained the following in its legal column:

"A horse case was brought before Judge Goepp to-day, in the marine court, which the lawyers turned into a legal hobby, trotting out more law and logic on the animal than has been aired for many months in Chambers. Robert E. Stanwood sold a horse to John O. Taylor, with the usual warrantee of 'sound wind, limb, etc.,' the price to be $150, payment agreed on as follows: $60 in cash, two notes of $49 each, one due at thirty days, and the other at sixty days, and a chattel mortgage on defendant's furniture. After a week's trial, the horse was found to be very lame, very sick and very full of chronic rheumatism, and the object is now, after returning the horse, to recover the $60 paid. Counsel for defendant asked, 'Where could this case be tried?' It is an action in equity, and must be tried in the equitable branch of this court, and the marine courts have no such branch. The power of this court comes directly from the statutes, and this case is not within the jurisdiction of this court. *A few years ago this suit would have had to commence in chancery*, and about the time when the horse died of old age, the case would go to the supreme court, *and so on down*, annulling our chattel mortgage, and puzzling the keeper of the records to know when, where and on what grounds the suit was commenced. Counsel for plaintiff said 'the case was plain enough. There was a fraudulent sale of a bad animal, represented as a good one, and he could not see any reason why counsel should try to emasculate the dignity of this court by trying to keep his honor from a just decision, which would be to order the repayment of the $60 gained by the plaintiff on false pretensions.' The judge questioned the defendant as to his disposition of the notes and his intentions regarding the chattel mortgage, *which not appearing satisfactory, he came to the conclusion that the case should be tried at the general term.*"

It is hardly possible that any legal publication would follow this in sober earnest. There is a patent absurdity on its face which would not be likely to be passed over without a good deal of doubt as to whether it was possible that suits in the state of New York were commenced in the supreme court and taken down on appeal, and that an action for money paid without consideration had to be brought in chancery. But this is not always the case, the error being more frequently latent. At the same time there is, unfortunately, no presumption as to the infallibility of judges, and an editor soon learns the truth of the saying of a famous English barrister, to a junior who had expressed surprise at a ruling of the Court of Queen's Bench, and had been brought to task for his remarks, that when his young friend had been as long at the bar as he had, he would be surprised at nothing the court might do. We therefore take the present opportunity to advise our friends who are in the habit of sending us newspaper reports of important cases, for publication in the JOURNAL, that unless they are certified to as absolutely correct, in some way that will place their authority beyond a doubt, we shall be compelled to decline them. To adopt a different rule, and at the same time attempt to conduct a trustworthy law journal, would be impossible.

—THE next term of the Supreme Court of Missouri will commence on the third Tuesday of October, the 17th of that month.

The New Charter of Saint Louis.

How to govern large cities is the most perplexing problem with which the American statesman of the present generation has to grapple. What is known as the "bummer element"—the great penniless riff-raff which predominates numerically in some of our great centres of commerce—has in some cases succeeded, under the leadership of unscrupulous adventurers, in getting control of the machinery of municipal government, and in turning the whole thing into an organized system of public plunder. Twenty years ago, the only way out of the misgovernment of this anarchical class was believed to be found in the plan of governing the city by the state; and upon this theory, boards of police commissioners and commissioners of public works were created, whose members held their offices from the state executive, and who were removed chiefly if not entirely from local control. All the great American cities, we presume, derive their charters from the legislatures of their respective states, and hold them subject to legislative modification and repeal. But it is obvious that the rural inhabitants of a state are not qualified, either by reason of their knowledge of, or their interest in, the subject-matter, to legislate for the great cities within the state's boundaries, or to prescribe the necessary changes in their organic laws. The "country members," as they are called, of the Missouri legislature, have generally felt this, and have, by common consent, left the needed legislation pertaining to the city of Saint Louis to be shaped by the legislative delegation from that city. These grave duties have, therefore, been generally delegated to a body of some twelve men, among whom there would usually be a minority of honest and capable members, but a majority of whom would be of the standard generally known as "ward politicians." The same system has prevailed in many, if not all, of the other states, and the result has been that government of the city by the state has not been a success. The grossest jobbery and corruption have resulted, at once afflicting the city, and contaminating the legislative councils of the state. In the recent constitutional convention of Missouri, the spirit of reform developed itself in an unexpected direction. That body, while dishonestly denying to the large cities their just *ratio* of representation in the legislature, was gracious enough to provide a measure by which the people of the city of Saint Louis might make their own organic law. The measure ordained by the convention was that there should be elected by the qualified voters of the city and county a board of thirteen freeholders, whose duty it should be to propose a scheme for the separation of the city and county, and a charter for the city, which scheme should be submitted to the qualified voters of the county, and the charter to those of the city; and, in case both should be duly ratified by a majority of votes, they should become the organic law respectively of the county and city. This board of freeholders was duly elected; has met and performed its work; and on the 22d instant, the people of the county and city, respectively, will vote on the question of ratifying or rejecting the new measure. Thus, the constitutional convention went back to primitive ideas of local self-government, and cast upon the people of St. Louis city and county the duty of governing themselves, even to the making of their own organic law,—imposing upon them but two restrictions: 1. That "such charter and amendments shall always be in harmony with, and subject to, the constitution and laws of Missouri, except only that provision may be made for the graduation of the vote of taxation for city purposes in the portions of the city which are added by the proposed enlargement of its boundaries." 2. That the commissioners appointed to frame the scheme and charter should be freeholders.

The following is a summary of the salient provisions of the

proposed charter: The legislative power is vested in a municipal assembly composed of two houses, a council and house of delegates. The council is composed of twelve members and a president, all of whom are chosen on a general ticket, hold office for four years, and must be freeholders of the city. The lower house consists of one member from each ward, to be chosen for two years. Neither house may adjourn without the consent of the other, and both houses are given power to punish for contempt. Before a bill can become an ordinance, it must be adopted by a majority of both houses and signed by their presiding officers. The mayor and leading city officers are elected by a general vote for a term of four years, the inferior officers being appointed by the mayor for the same term, subject to the approval of the council. The mayor must be a freeholder, and his residence and that of every other officer of the city is required to be within the limits of the city, otherwise their offices become vacant. All officials are liable for the acts of their subordinates. No person in the service of the city is to receive a higher salary than $5,000; all fees are abolished. The assembly can not appropriate any money for charitable purposes except such as shall be subject to its own supervision and administration under a system whereby the partakers of charity shall earn what they receive. No stone quarry is to be opened or brickkiln located, or soap factory, slaughter house, bone or refining factory erected within the distance of 300 feet of any dwelling house, without the consent in writing of the owner and occupier of such dwelling house. All supplies for every department are to be advertised for and bought by an officer called the supply commissioner. All judges and clerks of election are required to possess the qualification of members of the council. A novel system of counting the ballots, which shall prevent fraud at elections, is adopted. Any elected officer may be removed from office by a two-thirds vote of the council. If the mayor be removed, the president of the council succeeds him. Any elected officer may be suspended by the mayor, and if the council sustain the action of the mayor, the officer shall be removed and a new election ordered. If the mayor removes an appointed officer, he must immediately notify the council, which shall fill the vacancy. All officers appointed by the mayor are subject to removal by the council, but if so removed, the mayor may fill the vacancy without confirmation of the council. All other appointments made by the mayor require confirmation by the council. When the council refuses to confirm, the mayor must nominate another person within ten days; if he fail to do this, the council may elect such officer themselves. The mayor can not make any appointment till he has been two years in office. Judges and clerks of election must be taken from both political parties. On that portion of the city within the present boundaries, taxes to the amount not to exceed one per cent. for municipal purposes may be levied, and on that portion known as the extended limits, a sum not to exceed four-tenths of one per cent. Taxes collected for municipal purposes, and for the payment of the public debt, are to be kept in a separate fund instead of being mixed up, as now, with the general revenue. No appropriation can be made from any revenue fund in excess of the amount standing to the credit of such fund now for purposes to which the money therein is not applicable. No claim can be paid without the ordinance which directs it has the endorsement of the comptroller to the effect that sufficient money stands to the credit of the fund named to meet the requirements of the ordinance, and the approval of the auditor. The public parks, water works, fire department and charities are under the charge of the commissioners appointed by the mayor. The board of health is given the most unlimited powers during the presence or expectation of an epedemic. A list of officers drawing at present salaries to the total amount of $120,000 is abolished.

It will be seen that the provisions of this charter have been carefully planned in the interest of honest, economic and yet efficient government. We shall be greatly disappointed if the people reject it; for we are confident that it will furnish Saint Louis with a basis of municipal government unsurpassed by that of any American city.

Evidence—Entries against Interest.

TAYLOR v. WITHAM. WITHAM v. TAYLOR.*

English High Court, Chancery Division, June, 1876.

The rule as to the admissibility in evidence of entries against interest made by a dead man, embraces entries which *prima facie* were against his interest at the time when they were made, and the purpose to which the evidence is capable of being applied is immaterial. An entry of a payment of interest made to the dead man is *prima facie* against his interest within the meaning of the rule.

Taylor v. Witham was a suit to establish an agreement between executors of whom the defendant, S. Witham was one, whereby it was agreed that the defendant should give up his claim to a legacy of £2,000, and that no claim should be made against him in respect of an alleged debt of the same amount due from him to the testator. The testator had made payments to or for the benefit of the defendant to that amount, but, as the defendant alleged, by way of gift.

Witham v. Taylor was a cross-suit to set aside the agreement. The question of the existence of the debt of the defendant to the testator being an issue in the causes, the plaintiff proposed to put in evidence the following entries in the accounts of the testator, and in his handwriting:—

"1872, Oct. 1. J. Witham paid me
3 months' interest.....£20
1872, March interest.....20
July 8. Int. Paid me.....20
Oct. 1. Int. Paid me.....20
1872, Dec. 27. Paid me.....20
Left £1,960."

Chitty, Q. C., and *Grantham*, for the plaintiff, submitted that the entries could be read as declarations against interest, without a foundation being laid by independent evidence of the debt, notwithstanding Doe v. Vowles, 1 M. & Rob. 261, and the observations in Higham v. Ridgway, 10 East, 309. Mr. Baron Parke held that no such other evidence was required. 2 Smith's Leading Cases, 338; Davies v. Humphreys, 6 M. & W. 166. [Jessel, M. R.—The ground is that there is a *prima facie* probability that the entries are true.]

Cookson, Q. C., and *Bosanquet, Rawlins* with them, for the defendants, were then called on as to the necessity of an independent proof of the debt. There is no precedent for the admission of such entries without other evidence of the debt. An entry of payment of interest is different from ordinary entries of payment. Briggs v. Wilson, 5 De G. M. & G. 12, 2 W. R. Ch. Dig. 46, is precisely in point. [Jessel, M. R.—I think the refinement of Lord Justice Turner, when he considers the difference in operation of entries before and after the period of limitation has expired, is dangerous. In fact, the entries before the period expires, operate to throw back that period, and are, therefore, in a sense not against interest. The test comes back to this, what was *prima facie* the meaning of the dead man's entry when he made it?]

JESSEL, M. R.—This question is one frequently occurring and often very important. Under what circumstances can entries made by a dead man be received in evidence? There is no doubt of the established rule, when the entries are against interest, they are receivable, and when receivable, they may be used for all purposes. Now, what is the meaning of "against interest"? I agree with Mr. Baron Parke that it means against interest *prima facie*, and nothing more. If you can show *aliunde* that there was a special reason for making the entry, then the evidence may be worthless, but it is not the less admissible if against interest *prima facie*. But, it is said, in order to let in the evidence, you must show by independent testimony circumstances proving the entry to be against interest. In the present case, the entries were made by the testator in his ordinary book of accounts, the genuineness of which is not disputed.

The import of the first entry is *prima facie* a receipt of money; in its natural purport it is a note in the testator's book that he has received £20. Now, the real value of the entry in this particular case, is as evidence that there was a debt; but that is a circumstance collateral to the natural meaning of the entry by itself. The use made of it as evidence is immaterial. But, it is said, to make this use of the evidence, you must have something else to show *prima facie* a debt existing to which the entry may be referred. If that be so, and no one, I think, goes farther than that against the admissibility—not even Mr. Justice Littledale in Doe v. Vowles, where the evidence which was rejected ought, so far as I can judge, to have been received—if that is so, we have it proved here, first, that the testator advanced £2,000; secondly, that he received this £20, and other sums. So that there is a good deal of testimony beyond this mere entry. However, I wish to ground my decision upon the point I mentioned first, that the evidence is admissible, or not, according to its *prima facie* meaning; and if admissible, is so for all pur-

*24 W. R. 877.

poses. The other entries are as follows: [his lordship read the entries.] All these show nothing but payments to the testator, and the natural meaning of them is against his interest. No doubt they can be connected with each other, and with other entries, which makes them important evidence, but taken by themselves, they are nothing but entries against interest. In the case of each of these, also, there is other evidence of the debt, so that their admissibility may be justified on that ground also. It follows that all these entries are, in my opinion, evidence. I think, moreover, that they are very important evidence, and it would be much to be regretted if a judge were compelled to reject cogent evidence through some technical rule of law.

Holidays.

IN RE. WORTHINGTON.

United States District Court, Western District of Wisconsin.

Before Hon. J. C. Hopkins, District Judge.

Where a statute declares a certain day a holiday, no authority exists on that day to do any official act. Therefore a judgment docketed on that day is a nullity, and no lien on real estate results therefrom.

HOPKINS, J.—This is an application of Charles E. Storm and others, judgment-creditors of the bankrupt, for an order directing the assignee to sell certain real estate of the bankrupt, situate in the county of Wood, and to apply the proceeds upon their judgment, and for leave to prove, as unsecured creditors, any balance that remains upon the judgment after applying said proceeds thereon. They show in their petition that on the 24th of December, 1874, they recovered judgment against the bankrupt for $3,464.11, in the Circuit Court of Milwaukee county, and that on the 25th day of December, a transcript was filed and the judgment docketed in Wood county, and they claim that thereby it became a lien upon the real estate of the bankrupt situate in that county. They represent that the real estate in Wood county which they want sold, is not of sufficient value to pay their judgment, and pray that the assignee may be directed to sell it free of the lien, and to pay the proceeds to them, and that they be allowed to prove up the deficiency as an unsecured debt.

The assignee opposes the granting the order, on the ground that the judgment is not a lien on the bankrupt's real estate in Wood county, for the reason that it was docketed there on the 25th day of December, which is by the statute of this state declared to be a legal holiday. Laws of 1862, chapter 248.

This raises the question as to the operation of a statute declaring a certain day a holiday. The act does not in terms prohibit any act from being done on that day; it simply declares that the day shall be a holiday. Does that make the official act of the clerk in docketing the judgment on that day void? For only upon that ground can this court consider the question. If it is voidable, the party must go into the state courts for redress.

The question is settled in Lampe v. Manning, 38 Wis. 673. It seems to me that the clerk had no authority to docket the judgment on that day, and if not, the entry was void and no lien was created thereby. The court there hold that the term "holiday" imports *dies non juridicus*, and that no authority exists on that day to do any official act, although no express prohibition is contained in the act, that a prohibition is implied in the term holiday. This is a decision of the state court upon the effect of the statute, and it may be unnecessary for this court to go further in search of authorities to support it. If declaring the 25th of December to be a legal holiday, *ipso facto*, made it no day in law, we are to look to the common law to see what acts, if any, could be performed on such days.

Sunday, at common law, was regarded as a *dies non juridicus*. In Becloe v. Alpe, Sir William Jones, 126, the court say that Sunday was not *dies juridicus* for the awarding of any process, *nor for entering any judgment of record*. Van Vechten v. Paddock, 12 John. 177. Lord Cook, in Mackally's Case, 9 Coke, 66, took a distinction between judicial and ministerial acts, performed on that day, but in Hoyle v. Cornwallis, 1 Strange, 387, that distinction was overruled, so that at common law both ministerial and judicial acts were prohibited on such days.

Now by adopting the decision of the supreme court as the authoritative interpretation of the act, it follows that the entering of the judgment on that day was void, and hence no lien was created thereby. See also, for a further discussion of this question, Story v. Elliot, 8 Cow. 27; Hoghtailing v. Osborn, 15 John. 119; Butler v. Kelsey, Id. 177. If the judgment was a lien, it is preserved by the bankrupt law, and it is the duty of this court to protect it as such. But in determining that question, we have to look to the state statutes and the construction placed upon them by the state courts, and if by those the judgment is a valid lien, it is our duty to give it its full force and operation.

The filing of the transcript and docketing of the judgment in Wood county, were necessary to give a lien on the bankrupt's real estate in that county. 2 Taylor Stats. 1509, sections 61 and 62, and such filing and docketing having been on the 25th of December, they were not legally done, and must be regarded a nullity, which leaves the petitioners, as to those lands, in no better situation than any other creditor of the bankrupt. As the entry constitutes an apparent cloud on the title, they should cause a cancellation of the docket entry, so as to remove the colorable lien created thereby. The assignee is therefore ordered to sell the real estate in Wood county free of any lien of the petitions by virtue of the said judgment, and to hold the proceeds for distribution among all the unsecured creditors; and in order to further protect the purchaser or purchasers thereof from the assignee, I shall direct that an injunction issue out of this court perpetually enjoining and restraining the petitioners, and their attorneys and agents, from selling, or offering to sell, such real estate, or any portion, by virtue of said judgments, or from enforcing, or attempting to enforce, the same upon said real estate.

The petitioners having voluntarily appeared and moved the court to enforce the pretended lien, the court has thereby acquired jurisdiction to proceed and dispose of the whole matter in this summary way, which it could not have done upon summary petitions of assignee. But the authorities hold, that although a party claiming an adverse interest can not be brought in by petition by assignee in a summary way to have the claim determined, that such claimant may voluntarily come in by petition and submit his claim to the decision of the court, without resorting to the form of a plenary action.

The petitioners have leave to prove for the full amount of the judgment being valid, for aught that appears to the court now, the lien on real estate in Wood county alone being void. An order and injunction will be issued in accordance with this opinion.

Suit by Foreign Administrator.

KANSAS PACIFIC RAILWAY CO. v. CUTTER, ADMINISTRATOR.

Supreme Court of Kansas.

Hon. S. A. KINGMAN, Chief Justice.
" D. M. VALENTINE, } Judges.
" D. J. BREWER, }

1. Right of Action.—An administrator appointed in another state or territory can maintain an action in this state under Sec. 422 of the Code of Civil Procedure. J. M. & I. R. R. Co. v. Hendricks, 41 Ind. 49.

2. Presumption.—Where the petition alleges the appointment in the territory of Colorado of the plaintiff as administrator, and her subsequent marriage, and does not show what effect, by the laws of Colorado, such marriage has upon her authority as administratrix, it will be presumed, upon demurrer, in accordance with the laws of this state, that it has no effect thereon.

I. P. Usher & C. E. Bretherton, for plaintiff in error; *S. Brown, Green, & Hessen*, for defendant in error.

Action for death of intestate through negligence of plaintiff in error, defendant below.

The opinion of the court was delivered by BREWER, J.

The first question in this case is whether a foreign administratrix can maintain an action under sec. 422 of the code of civil procedure. We think he can. The section provides that "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission." Now this language is general, purports to give the cause of action to every such case happening within the state, whether the deceased is a resident or a non-resident, whether death ensue here or elsewhere. All it nominates as the condition of a right of recovery is the wrongful act and the resulting death. Nor does the proceeds of the recovery become assets in hand of the administrator for the payment of the debts of the intestate. They are appropriated by the same section which gives the right of action to the "exclusive benefit of the widow and children, if any, or next of kin." And the recovery by a foreign administrator does not at all conflict with those provisions of our law which attempt to secure the appropriation of the property of a decedent within this state, to payment of his debts due here, in preference to those due elsewhere. It, so to speak, creates a fund for the exclusive use of certain relatives of the deceased, and names the personal representatives as the trustees of that fund, and authorizes suit in their names. Any one else might have been named as the proper party plaintiff. Authority might have been given to the widow, and for the benefit of herself and children. This question has been before the Supreme Court of Indiana in the case of J. M. & I. R. R. Co. v. Hendricks, 41 Ind. 49, and the right of action sustained. This is the only authority counsel have cited that is apparently exactly in point, and to that we refer for a fuller discussion of the question. There is a slight difference between the section of the Indiana statute and ours, concerning the right of foreign administrators to sue, but we do not think it affects the question materially. See, also, Hartford & R. R. Co. v. Andrews, 36 Conn. 213.

The second objection to the petition is, that it appears, since the granting of letters of administration to the plaintiff, she has intermarried with one B. P. Cutter. Letters of administration were issued in Colorado. It is not alleged what, by the laws of Colorado, is the effect of such marriage upon the letters of administration. Counsel contend that, that in the absence of any allegation, the common law must be presumed to be in force there, and that by that the husband thereupon became a joint administrator and should have been united with her as part plaintiff. We do not understand that we are bound to presume as counsel contends. The petition shows an appointment which gives an authority to

sue. It does not allege any revocation of that authority by the power that granted it. It alleges a fact which, by our present law, would have no effect upon the authority, though as to the laws prior to 1868, see Comp. Laws, p. 516, sec. 29. And if we are to rest upon presumptions, we should presume that the laws of Colorado in this respect are like ours. And hence that the authority granted still continued and remained solely in the plaintiff, notwithstanding her marriage. Furrow v. Chapin, 13 Kan. 113; French v. Pease, 10 Kan. 54.

There being no other question in the case, the ruling of the district court, overruling the demurrer, will be affirmed.

Insanity as a Ground of Divorce.

WERTZ v. WERTZ.*

Supreme Court of Iowa, June Term, 1876.

Hon. W. H. SEEVERS, Chief Justice.
" JAMES G. DAY,
" JAMES H. ROTHROCK,
" JAMES M. BECK,
" AUSTIN ADAMS, } Judges.

Neither insanity of the wife occurring after marriage, although permanent, nor impotency caused by such insanity, nor cruel and inhuman treatment while insane, is, under the Iowa statute, a ground for divorce. Douglass v. Douglass, 31 Iowa, 431, distinguished.

Action for divorce. The petition states the cause of action as follows:

1. On the 7th day of February, 1874, plaintiff filed a petition alleging, first, marriage of himself to defendant in Boone county, Iowa, on May 25th, 1870.

2. That they lived together as husband and wife till June, 1872, when defendant, without any fault or negligence on his part, became hopelessly and incurably insane, and by reason of her insanity she became, and was, dangerous to live with; that she had often struck at him with a knife and other deadly weapons, and tried to kill or injure him. That one child was born to them, and that had to be kept from her to save its life. That she became careless of her person, lost all sense of shame and virtue, and was so dangerous, and intent on the destruction of everything that came in her way that his life was endangered by living with her, and that she had been a long time confined in the insane asylum at Mt. Pleasant, Iowa, where she was not improving, but was declared hopelessly and incurably insane, being supported there by the county.

3. Impotency caused by insanity.

The court appointed D. R. Hurdman, Esq., to make a defence, and a demurrer was filed to the petition, which being sustained, the plaintiff appeals.

Hull & Ramsey, for plaintiff; *D. R. Hurdman*, for defendant.

SEEVERS, C. J.—Marriages may be annulled under the code where either party was impotent, insane or idiotic at the time of the marriage. Sec. 2231. But neither cause, whether existing at the time of the marriage or arising subsequent thereto, is in terms by the code made grounds for a divorce. The statutory ground or cause of divorce on which the plaintiff must succeed, if at all, is as follows: "When the defendant is guilty of such inhuman treatment as to endanger the life of the plaintiff." Code, Sec. 2223. The inhuman treatment on which the plaintiff relies occurred while the defendant was insane and mentally incapable of knowing what she did. It is the accepted doctrine that adultery committed while the party is insane is not a ground of divorce 1 Bishop on Marriage and Divorce, sec. 712, and authorities cited. If this be true, and it seems to us it must be, why should consequences flow from acts of cruelty which do not from the adultery of the insane party? Cases may exist where the party has committed adultery while sane, and afterward becomes insane, in which it is held such insanity will not bar a divorce. 2 Bishop on Marriage and Divorce, 304, 308. We do not desire to commit ourselves to this doctrine, for it is unnecessary to do so; but there is a clear and well defined distinction between adultery committed while sane and insane. The former has the assent of the mind; the party knows the consequences and accepts the responsibility and contingency of disgrace; in the latter case, these are wanting.

It is said that marriage is a civil contract, and should be dissolved for like causes as other contracts, or rather that insanity of a partner is sufficient cause to warrant the dissolution of the contract of partnership, and that the same cause should dissolve the marriage relation. Without wishing to be understood as adopting the view that the contract of marriage bears the slightest resemblance to that of partnership, still we may admit such resemblance in a legal point of view, and yet the position claimed by counsel for the plaintiff stands unproved. The marriage relation or contract can only be dissolved on some one of the grounds named in the statute, and insanity is not one of these. We do not require a statute to aid us in determining what grounds are necessary to dissolve a partnership. The distinction between the two cases is obvious, and none more alike can, we apprehend, be cited.

It is said the attack made on the defendant with a knife was an assault, and that "insane persons are generally held civilly liable for torts, as the actionable quality of such acts does not depend upon the intention." Behrens v. McKenzie, 23 Iowa, 333. Accepting the foregoing, which was said by Dillon, J., by way of argument as true, it has no application to this case. Here the plaintiff asks a dissolution of the contract substantially because the defendant is insane; but insanity is not a ground for a dissolution of the contract. And the defendant may be civilly liable for torts committed while insane; that is, liable to respond in damages. But if she is, it is by virtue of a clear and well recognized principle which applies to such case and not to this.

The case of Douglass v. Douglass, 31 Iowa, 421, is clearly distinguishable from this. There the cause for divorce was desertion, which commenced during the time the defendant was sane. The two cases do not conflict.

For the reasons stated, the judgment of the circuit court must be AFFIRMED.

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National Banks—Right of Assignee to recover Illegal Interest paid by Bankrupt.

CROCKER, ASSIGNEE v. FIRST NATIONAL BANK OF CHETOPA.*

United States Circuit Court, District of Kansas.

Before Hon. JOHN F. DILLON, Circuit Judge.

1. National Banks.—A national bank located in Kansas charged and received interest at the rate of 18 per cent. per annum: *Held*, that it was liable under the National Banking Act (Rev. Stats. secs. 5197, 5198) to pay back twice the amount of interest thus received.

2. Assignee in Bankruptcy.—If the person who paid such illegal interest is adjudged a bankrupt, the right of action passes to his assignee in bankruptcy, such assignee being his "legal representative" within the meaning of sec. 5198 of the Revised Statutes.

3. Measure of Recovery.—The amount of the recovery is twice the full amount of interest paid, and is not limited to twice the *excess* of interest paid over the legal rate.

This is an action by an assignee in bankruptcy, brought in 1875, to recover from the defendant, a bank organized under the act of Congress commonly known as the National Banking Act, double the amount of interest which he charges was taken from the bankrupts by the defendants upon numerous transactions after 1872, and prior to the bankruptcy. The petition charges in each count that the interest charged was "a greater rate of interest than was allowed by the laws of the state of Kansas."

It is material to enquire what was the law of the state of Kansas, in regard to interest, during the period covered by the counts not barred by the statute. To properly understand the Kansas interest law, it is necessary to begin with the General Statutes, 1868, chapter 51, page 526, which contain the following:

"Sec. 2. The parties to any bond, bill, promissory note, or other instrument of writing for the payment or forbearance of money, *may stipulate therein for* interest receivable upon the amount of such bond, bill, note, or other instrument, at any rate not exceeding *twelve per cent.* per annum.

"Sec. 3. All payments of money or property made by way of usurious interest, or of inducement to contract for more than twelve per cent. per annum, whether made in advance or not, shall be deemed and taken to be *payments made on* account of the *principal*, and the courts shall render judgment for no greater sum than the balance found due after deducting the payments of money or property made as aforesaid, *without interest*; nor shall any debtor be deemed in equal wrong on account of having paid, or having agreed to pay, such usurious interest or such inducement, but shall have like remedy and relief in either case.

"Sec. 4. Any person contracting, by promissory note, bill of exchange, bond, or otherwise, to receive a greater rate of interest than that allowed by this act, shall forfeit all interest, and shall recover no more than the principal of such note, bill, bond, or other contract."

These sections clearly limited the rate of interest to twelve per cent. per annum, and punished the creditor who contracted for more with an entire forfeiture of all interest, at the same time rewarding the debtor with a credit upon the principal debt of so much as he might have paid for interest on a usurious contract. This remained the law until June 20, 1872, when sections two, three and four quoted were repealed by the act of February 28, and the following took effect:

Laws 1872, p. 284. "Sec. 2. The parties to any bond, bill, promissory note, or other instrument of writing for the payment or forbearance of money, may stipulate therein for interest receivable on the amount of such bond, bill, note, or other instrument of writing: *provided*, that no person shall recover in any court more than twelve per cent. interest thereon per annum.

"Sec. 3. All payments of money or property made by way of usurious interest or inducement to contract for more than twelve per cent. per annum, whether made in advance or not, shall be deemed and taken to be payments made on account of the principal *and* twelve per cent. interest per annum, and the courts shall render judgment for no greater sum than the balance found due after deducting the payments of money or property made as aforesaid."

A general denial was filed to the petition, a jury waived, and the cause tried by the court.

McComas & McKeighan, for the plaintiff; *John K. Cravens, contra.*

DILLON, C. J.—The usurious transaction in respect of which this action is brought, occurred after the state statute of June 20, 1872 (Laws

* 3 Am. Law Times Rep. 350.

1872, p. 284), went into operation. This statute, as construed by the supreme court of the state, "allowed parties to contract for any rate of interest they might choose, but did not allow the creditor to recover for more than the principal *and* interest at the rate of twelve per cent. per annum." Jenness v. Cutler, 12 Kan. 511, *per* Valentine, J.

On the loans to the bankrupts, the defendant bank contracted for and received interest at the rate of eighteen per cent. per annum. If the debtors had not been adjudged bankrupt, could they have recovered under section 30 of the National Banking Act? Rev. Stats. secs. 5197, 5198. If so, does this right of action pass to their assignee in bankruptcy? And if so, what is the extent of the recovery? These are the questions in the case.

1. If the effect of the state statute of June 20, 1872, was to abrogate all rates of interest; if after that enactment no rate of interest exists or "no rate is fixed by the laws of the state" of Kansas, then national banks would be restricted to seven per cent. as the maximum rate they could lawfully charge. Rev. Stats. 5197; Tiffany v. National Bank of Missouri, 18 Wall. 408; 1 Am. L. T. R. (N. S.) 158.

If, however, this was not the effect on that enactment, then twelve per cent. is the maximum legal rate allowed by the laws of Kansas. In either event, the defendant bank charged and received an illegal rate. If bankruptcy had not supervened, it is clear that Marsh and Overhuls, the bankrupts, might, under the National Banking Act (Rev. Stats. sec. 5198), have recovered from the defendant bank twice the amount of interest paid, as therein provided.

Indeed, the right of action is yet *in them* if it is not barred by the two years' limitation (Rev. Stats. sec. 5198), unless it has passed to their assignee in bankruptcy.

2. The next question is, *Is* the assignee in bankruptcy their "legal representative" within the meaning of the statute? Rev. Stats. sec. 5198. It is our opinion that an assignee in bankruptcy is, in respect of such a claim as this, which has injuriously affected and reduced the estate in bankruptcy, and which is to be enforced "by an action in the nature of an action of debt," peculiarly and most appropriately "the legal representative" of the bankrupt. Every reason which, in case of the death of the debtor, without bankruptcy, would give the right of action to the administrator or executor, as his legal representative, applies with full force to the assignee in bankruptcy, if his estate is, during his lifetime, administered in a court of bankruptcy. See Tiffany v. Nat. Bank of Mo. *supra*; 1 Deacon on Bankruptcy (3d ed.), 523, 524; Beckham v. Drake, 2 H. L. Cases, 640.

In this view it is unnecessary to determine whether the right of action would vest in the assignee under the bankrupt act (Rev. Stats. secs. 5044, 5045, 5046, 5047), though it seems not improbable that the provisions of these sections are comprehensive enough to embrace it. Darby's Trustees v. Boatmen's Sav. Inst. 1 Dillon, 141; s. c. 18 Wall. 375.

Under the English bankrupt act no right of action passes to the assignee for a mere personal tort to the bankrupt, as for assault or libel, but it is otherwise in respect of injuries or torts which result in diminishing the estate of the bankrupt; and the distinction is taken between rights of action where personal suffering or inconvenience is the primary cause of the action (which do not pass), and where pecuniary loss or damage is the primary cause of action, which do pass. 1 Deacon on Bankruptcy (3d ed.), 522, *et seq.* This distinction seems to be made in our bankrupt act, which vests in the assignee all such "rights of action."

3. The next question is, whether the recovery shall be for double the whole amount of interest paid, or only double the amount in *excess* of the legal rate, whether that be seven or twelve per cent. Where an illegal rate of interest is charged, and an action is brought on the contract, the statute declares a "forfeiture of the *entire* interest," and if the usurious interest has been paid, the statute gives an action to recover back, not simply the excess over the legal rate, but "twice the amount of interest thus paid," that is, paid in pursuance of an usurious contract or transaction.

National banks owe a duty to the public to observe the limitations of the act of Congress in respect of the rate of interest; limitations wisely imposed, but in many of the western states, at least, very frequently disregarded. They have privileges enough, without usurping others. They have powers enough, without exercising those not conferred, or transcending the limits of their charters. They ought not to become usurers; and if they do, public policy is promoted by an enforcement of the penalties which the statute has denounced. It should be borne in mind that the statute confirms the action to the person who has paid the illegal interest, or to his legal representative, thus showing that it was in part his purpose to repair this loss or reimburse his estate—there being superadded, for the further purpose of preventing such violations of the law, the infliction of a penalty of twice the amount of interest paid. This penalty was, doubtless, supposed by Congress to be no more than would be reasonably sufficient to cover the excess of interest over the legal rate, and costs and expenses of litigation, and at the same time make it more profitable to the banks to obey the law than to violate it.

Judgment will be entered for the plaintiff for $2,219.92, that being twice the full amount of interest paid on the usurious transactions set out in the petition, not barred. JUDGMENT ACCORDINGLY.

—THE head-note to Blackman v. Bainton, 15 C. B. N. S. 432, is quaint: "Twenty-five witnesses and a horse on one side against ten witnesses on the other. *Held*, not such a preponderance of 'inconvenience' as to induce the court to bring back the venue from the place where the cause of action (if any) arose."

Form of Action against Stockholders for Debts of Corporation—Statute of Limitations.

CARROL *ET AL.* v. GREEN *ET AL.*

Supreme Court of the United States, October Term, 1875.

1. Form of Action.—Case, and not debt, is the proper form of action against a stockholder, for the debts of a corporation.

2. Statute of Limitations.—The statute of limitations in force when the cause of action herein occurred, was the act of 1712, and under that the action is barred.

Appeal from the Circuit Court of the United States for the District of South Carolina.

Mr. Justice SWAYNE delivered the opinion of the court.

A number of important questions arising in this case have been fully argued, which we shall pass by without remark. We have not examined any of them exhaustively, and have not found it necessary to do so. Our judgment will be placed upon the defence of the statute of limitations, and our opinion will be confined to that subject.

The appellees filed this bill, and the subpœnas were issued in the court below, on the 18th of June, 1872. The bill seeks to make the appellants individually liable as stockholders of the Exchange Bank of Columbia, which was incorporated by an act of the legislature of South Carolina, of the 16th of December, 1852. It is alleged in the bill that by this act the Exchange Bank "was endowed with the same rights and privileges, and was made subject to the same duties, liabilities, obligations and restrictions provided for the said Planters' & Mechanics' Bank," and that by the fourth section of the act incorporating the last-named bank, it was declared "that, in case of the failure of said bank, each stockholder, copartnership, or body politic, having a share in such bank at the time of such failure, or who shall have been interested therein at any time within twelve months previous to such failure, shall be liable and held bound, individually, for any sum not exceeding twice the amount of his, hers or their share or shares."

It is conceded, for the purposes of this opinion, that the provision quoted from the act of 1852 applies to the stockholders of the Exchange Bank as well as to the bank itself. The master found and the court below affirmed the finding as correct, that the Exchange Bank failed in the month of February, 1865, and never resumed business after that time.

The defendants severally set forth in their answers "that the cause of action stated in the bill did not accrue within four years before the exhibiting of said bill." The complainants replied and took issue. It appears that the bank suspended specie payment several years before its failure, at the time specified by the master, and some stress is laid upon this fact by the counsel for the appellants in discussing the case in this aspect. We have preferred to adopt the finding of the master, because it is the view most favorable to the appellees, because the proof as to that period brings the case clearly within the terms of the statute, while the proof is further that the bank paid specie until its suspension was legalized, and that if it had been put in liquidation on the first of February, 1865, it could then have met all its liabilities and redeemed its outstanding bills in specie or its equivalent. Rec. 63. Its subsequent losses arose from the war. According to the statute, the liability of "each stockholder" arose upon "the failure of the bank." The liability gave at once the right to sue, and, by necessary consequence, the period of limitation began at the same time. From the last of February, 1865, four years expired on the first of March, 1869. But there are certain interruptions of the running of the statute to be taken into account. An act of the legislature of the state, of the 21st December, 1861, suspended the statute of limitations until the close of the first session of the next general assembly. This suspension was continued by successive acts. The last one was passed on the 22d of December, 1865, and prolonged the suspension "until the adjournment of the next regular session of the general assembly." The supreme court of the state held that these acts arrested the effect of the statute of limitations from December 21, 1861, until December, 1866. Wardlow v. Buzzard, 15 Richardson, 158.

It does not appear in the case at what time in December, 1866, the general assembly adjourned. From December, 1866, the statute was in full force. Four years from that time expired in December, 1870. The war in South Carolina ended on the 2d of April, 1866. The Protector, 12 Wall. 701. The Circuit Court of the United States for South Carolina was open for business on and after the 12th of June, 1866.

In any view of the facts that can be taken, more than four years elapsed after the statute began to run before this suit was instituted. The statute of limitations of South Carolina, in force when this cause of action accrued, and under which the case must be decided, was that of 1712. Angel on Lim. Appendix, p. xcviii. The sixth section declares, among other things, "that * * * all actions of account *and upon the case*, (other than such accounts as concern the trade of merchandise,) * * * all actions of debt *grounded upon any* lending *or contract without specialty*, all actions for arrearages of rent reserved by indenture, all actions of covenant * * * which shall be brought at any time after the ratification of this act, shall be commenced and sued within the time of limitation hereafter expressed, and not after—that is to say, *the said actions upon the case* other than for slanders, and the said actions for accounts, * * * *and the said actions for* * * * *debt* * * * within three years next after the ratification of this act, or within four years next after the cause of such actions or suits, and not after." The

statute contains no exception as to the actions on the case, save that for slander. All others are expressly barred at the expiration of the time named. The section of the act of 1852, above quoted, which is said to create the individual liability here in question, is silent as to who shall sue. The suit was, therefore, necessarily to be brought by and for the benefit of the parties injured. 2 Inst. 650; Com. Dig. Debt, A. 1.

Individual liability is repugnant to the law of corporations, and qualifies in this case an exemption which would otherwise exist. Stockholders in such cases are liable according to the plain meaning of the terms employed by the legislature, and not otherwise. The section is silent as to a preference to any class of creditors. All, therefore, in this case stood upon a footing of equality, and were entitled to share alike in the proceeds of the litigation. The remedy against the stockholders was necessarily in equity. Pollard v. Bailey, 20 Wall. 521. They were severally compellable to contribute according to the amount of the stock they respectively held and the liabilities of the bank to be met, after exhausting its means, the maximum of the liability of each stockholder not to exceed, in any event, twice the amount of its stock. Iglehart v. The Bank of Circleville and others, 6 McLean, 568.

It is obvious from this statement that if there had been a suit at law against the stockholders, debt could not have been maintained. The action of debt lies on a statute where it is brought for a sum certain, or where the sum is capable of being readily reduced to a certainty. It is not sustainable for unliquidated damages. 1 Ch. Pl. 108, 113; Stockwell v. The U. S., 13 Wall. 542. "The action of debt is in legal contemplation for the recovery of a debt *eo nomine, and in numero.*" "Case, now usually called assumpsit," is founded on a contract express or implied. 1 Chy. 99; Metcalf v. Robinson, 2 McLean, 364.

Let us apply these tests to the case in hand. Certainly the amount sought to be recovered was not certain, and could not readily be reduced to certainty, and there was clearly an implied promise on the part of the stockholders. The legislature created the corporation, and prescribed certain terms to which the stockholders should be subjected. This was an offer on the part of the state. It could be accepted or declined. There was no constraint. By taking the stock, the terms were acceded to, the contract became complete, and the stockholders were bound accordingly. The same result followed which would have ensued under the like circumstances between individuals. The assent thus given and the promise implied are of the easence of the liability sought to be enforced in this proceeding. If a remedy at law were necessary, clearly it must have been case.

Case is a generic term, which embraces many different species of actions. "There are two, however, of more frequent use than any other form of action whatever. These are assumpsit and trover." Steph. Plead. 18. "The more legal denomination of the action of assumpsit is trespass on the case upon promises." 3 Woodison's Lectures, 168. This form of action originated, like many others, under the Statute of Westminster 2, 13 Ed. I. ch. 24, sec. 2. Its establishment was strenuously resisted through several reigns. 2 Reeves' Hist. pp. 394, 507, 608. It was sustained, upon full consideration, in Slades' Case, 4 Coke, 92, which was decided in 44th Elizabeth. When the statute of South Carolina of 1712, here in question, was enacted, the term case was as well understood to embrace assumpsit as anything else in the law of procedure to which it is now held to apply. Blackstone thought that one of the most important amendments of the law during the century in which he lived was effected "by extending the equitable writ of *trespass on the case*, according to its primitive institution, by King Edward the First, to almost every instance of injustice not remedied by any other process." 4 Com. 442. But if debt were the proper form of action, if this were a suit at law, the result must be the same. The act bars "all actions of debt" grounded upon any lending *or contract without specialty*,—also "after the lapse of four years." The contract here was of the class last designated. The statute was only inducement. The implied promise of the stockholders to fulfill its requirements was the agreement on their part and it was without speciality. Where a deed poll was executed by a lessor, and the lessee entered and enjoyed the premises, it was held that he was liable according to the terms of the lease, but that he was suable only in assumpsit. Goodwin v. Gilbert, 9 Mass. 484; Newell v. Hill, 2 Metcalf, 180. So, where one conveys land by deed, pursuant to a parol agreement, the law implies a promise by the grantee to pay the purchase-money, and it may be recovered, but the action must be in case, and not debt on the specialty. Butler v. Lee, 11 Alabama, 885; Bowen v. Bell, 20 John. 338; Wilkinson v. Scott, 17 Mass. 249. In Lindsay v. Hyatt, 4 Ed. Ch. 104, the act of incorporation declared that the directors and stockholders might be sued for the debts of the corporation, either at law or in equity, as if they were joint debtors or copartners. The vice-chancellor said: "It appears to me that the six years within which actions on simple contract indebtedness must be brought, does apply." Speaking of a suit at law, he said: "In such an action the declaration must be in case founded on the statute." * * * The form of the action, and the nature of the liability to be enforced, fall within the provision of the statute which takes away the right to sue after six years." Corning v. Horner & McCullough, 1 Comst. 58, was a suit at law against stockholders upon a similar statute, and involving the same statute of limitations. It was said that the action must "necessarily be an action on the case at common law upon the liability of the stockholders for the debt of the company." The same conclusion was reached as to the time when such actions were barred, as in Lindsay v. Hyatt. Baker v. The Atlas Bank, 9 Metc. 182, was a bill in equity founded upon a statute making the stockholders liable in the cases specified. The defendants relied upon a statute of limitations which declared that "all actions founded upon any contract or liability not under seal shall be commenced within six years next after the cause of action shall accrue, and not afterwards." It was held that the statute applied in equity as well as at common law, and that after the lapse of six years, the bar was complete. The Commonwealth v. The Cochituate Bank, 3 Allen, 42, was also a case in equity involving a statute creating a liability on the part of the stockholders of the bank, and the same statute of limitations. The same conclusions were reached by the court as in the preceding case.

It is insisted by the learned counsel for the appellees, that while the limitation act of 1712 provided that "actions of debt upon any lending or contract, without specialty" should be brought within four years, it did not limit actions of debt upon specialities, and that the liability here in question, being created by a statute, is to be regarded as falling within the latter class. It is said that an obligation to pay money, arising under a statute, is a debt by specialty. In support of this point Bullard v. Bell, 1 Mason, 243, has been pressed upon our attention. Fully to examine that case would unnecessarily extend this opinion. It was cited in Baker v. The Atlas Bank, and in Corning v. McCullough, without effect. We think it is distinguishable from the case in hand in several material points. If it be in conflict with the cases to which we have referred in this connection, we think the results in the latter were controlled by the better reason.

If a claim like that of the appellees, sued at law, would have been barred at law, their claim is barred in equity. This proposition is too clear to require argument or authorities to support it.

The decree of the circuit court is reversed, and the cause will be remanded with directions to dismiss the bill.

Contempt of Court.

STOREY v. THE PEOPLE.

Supreme Court of Illinois, July, 1876.

Hon. JOHN M. SCOTT, Chief Justice.
" PICKNEY H. WALKER, }
" SIDNEY BREESE, }
" B. R. SHELDON, } Judges.
" JOHN SCHOLFIELD, }
" ALFRED M. CRAIG, }
" T. L. DICKEY, }

1. Constructive Contempt — Libeling Jury — When Subject-matter of Libel not Pending.—A court may punish for contempt the publisher of a libel upon a jury or juryman, the subject-matter of which is *pending* before the jury at the time, where the libel has a tendency to impede or embarrass the jury in its duties; but not so, if the subject-matter of the libel has already been acted upon by the jury, and is not pending at the time.

2. ——. Common Law Powers.—Notwithstanding a statute provides for punishment for contempt in certain cases, this is not an absolute limitation upon the power of the court. Courts possess certain common law powers, subject to modifications imposed by constitutions and statutes, among which is that of punishing for contempt.

3. Summary Punishment — Trial by Jury.—A publication, however libelous, not directly calculated to hinder, obstruct, or delay courts in the exercise of their duties, does not make the publisher liable to a summary proceeding for contempt of court. The author or publisher of an article, however libelous, whether upon a citizen, a juryman, or a judge, has a right to a trial by a jury, unless the libel has a direct tendency to hinder or embarrass the court in its duties.

4. Freedom of Speech and of the Press.—The constitutional provision, "that every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty," gives the same right to comment upon the conduct and character of judicial officers that it does upon legislative and executive officers, and all have the same remedy.

The opinion of the court was delivered by SCHOLFIELD, J.

The several articles copied into the information consure the action of the grand jury and question its integrity as a body; and one of them indirectly attacks the moral character of certain of the members of the grand jury. The information charges that the articles were published while the grand jury was in session, and, also, that respondent was charged with certain crimes and offences which were heard by the grand jury; but it is not alleged that the crimes and offences so charged were pending before the grand jury for its action at or subsequent to the time of the pulication of the articles, or either of them. On the contrary, it is alleged that the articles were "of and concerning the grand jury and the individual members thereof, and of and concerning its action with reference to other complaints presented to it,"—all being in the past. And the respondent answers to one of the interrogatories propounded to him, "that on the 13th day of March, 1875, and before any of the said articles were so published, the grand jury * * * returned into said court three indictments against him for libel, and one for publishing an obscene newspaper, and said indictments were the only matters referred to in said articles, or any of them. And he further says, upon information and belief, that at the time said articles were written and published, there were no complaints against him pending before said grand jury, of any kind whatever, and he did not suspect that any other or further indictments would be returned against him by said grand jury; and he denies that said articles, or any of them, or any part thereof, referred to any complaints or charges then pending against him before said grand jury."

There is no allegation that the publication of the articles is calculated to prevent the obtaining of a competent petit jury to try the respondent

on the several indictments, or that the judge, whose duty it will be to preside during such trials will in anywise be affected thereby in the discharge of his duties.

The only question, therefore, is, assuming the articles to be libelous, whether the publication of a libel on a grand jury, or on any of the members thereof, because of an act already done, may be summarily punished as a contempt.

We do not understand the articles as having a tendency directly to impede, embarrass or obstruct the grand jury in the discharge of any of its duties remaining to be discharged after the publications were made. No allusion is made to any matter upon which the members were hereafter to act, and there could, therefore, be no attempt to interfere with the exercise of their free and unbiased judgments as to such matters. No attempt is made to induce disobedience in officers or witnesses, and it does not appear that any direct interference with the administration of the law was in contemplation. All that it would seem could be claimed is, that the publications would cause disrespect to be entertained by the public for the grand jury and for its action in the particular cases criticised, and thereby tend, to that extent, to bring odium upon the administration of the law. That this was a grave offence, deserving of prompt and severe punishment, might be conceded without in the slightest degree strengthing the position that it may be treated and punished as a contempt of court. The law, presumably, provides an adequate punishment and mode of procedure to protect society against all offences, and neither the magnitude of a crime nor the probability of its subsequent repetition has ever been held to authorize the courts to depart from the mode of trial prescribed by the law, or to impose a different punishment from that which it sanctions.

It is not denied by the counsel for the respondent that courts may punish as for contempt those who do any act directly tending to impede, embarrass, or obstruct the administration of the law, but they deny that any publication, however disrespectful, when applied to jurymen in regard to the manner in which they have already discharged a duty, does or is calculated to impede, embarrass or obstruct the administration of the law.

Authority may be found in the text-books and in English and American cases holding a doctrine at variance with this position. Thus for instance: Blackstone says, in showing how contempt of court may be committed, it may be "by speaking or writing contemptuously of the court or judges, acting in their judicial capacity; by printing false accounts (or even true ones, without proper permission) of causes then pending in judgment, and by anything, in short, that demonstrates a gross want of the regard and respect which, when courts of justice are deprived of their authority, (so necessary for the good order of the kingdom), is entirely lost among the people." But the law in relation to contempts has never been held, in any case decided by this court, to be so indefinitely broad as it is, as thus stated by Blackstone. Our constitution and statutes certainly affect the question, to some extent, and it is only in determining precisely how far they do so, that we have any difficulty. A statute of this state, in force for many years, provided that the circuit and supreme courts should have power to punish contempts offered by any person to them while sitting, and for disobeying any of their processes, rules, and orders issued or made conformably to law. And the court held in Stewart v. The People, 3d Scam. 402, that this statute might be regarded as a limitation upon the power of courts to punish for any other contempts; and newspaper articles, commenting upon the conduct of a juror, who was also the editor of a rival political paper to that in which the articles were published, and reflecting contemptuously upon the judge, published during the pending of a trial for murder, were held not to authorize an attachment for contempt.

It was said in that case, in speaking of the power to punish as for contempt, in case of mere libels upon the court, having no direct tendency to interfere with the administration of the law, "It does not seem necessary, for the protection of courts in the exercise of their legitimate powers, that this one, so liable to abuse, should also be conceded to them. It may be so frequently exercised as to destroy the moral influence which is their best possession, until, finally, the administration of justice is brought into disrepute. Respect to courts can not be compelled; it is the voluntary tribute of the public to worth, virtue and intelligence, and whilst they are found upon the judgment seat, so long, and no longer, will they retain the public confidence. If a judge be libeled by the public press, he and his assailant should be placed on equal ground, and their common arbiter should be a jury of the country; and if he has received an injury, ample remuneration will be made."

In the more recent case of The People v. Wilson, 64th Ill. 195, a majority of the court held the publication of an article indirectly charging that money had been used to procure a decision favorable to the defendant in a case pending before this court on a writ of error, was a contempt; and the court accordingly imposed fines upon the editor and publisher of the newspaper in which the offensive article was published. Authorities were referred to in support of the position assumed by one or more members of the court in that case, and a train of reasoning pursued in the separate opinions delivered, from which the court below may have inferred, and probably did infer, assuming the law had not since then been materially changed in this respect, that any libel upon the court or jury, whether tending directly to interfere with the administration of the law or not, might be punished as a contempt. But the decision turned upon the point, as will be seen by reference to the opinion of the chief justice, that the cause in reference to which the article was published was *then pending* before the court, undecided, and that the article was *calculated* to, and was *designed* to, influence the members of the court in *deciding it.*

But since the decision of that case the statutes have been revised, and the provision in regard to contempts before quoted has been repealed, leaving no statute in force on that subject, except in regard to the enforcement of decrees in chancery, and the punishment of certain specific offences, such as the failure of jurors to attend in obedience to summons, the failure of officers to make service and return of writs, etc.

Courts, however, possess certain common law powers, subject to modifications that may have been imposed by our constitution and statutes, among which are included that of punishing for contempts.

Differences of opinion have been entertained by members of this court at different times in regard to the extent of such modifications; and we feel constrained, in giving expression to our views in the present case, to disagree, to some extent, with remarks made by some of the members composing the majority of the court in Wilson's case, *supra.*

In our opinion, it is not admissible under our present constitution that a publication, however libelous, not directly calculated to hinder, obstruct or delay courts in the exercise of their proper functions, shall be treated and punished, summarily, as a contempt of court.

Libels on courts of superior jurisdiction were, at common law, held to be contempts; but this did not apply to courts of inferior jurisdiction. If the power were necessary to the existence and usefulness of the court, obviously the difference in the jurisdiction could make no material difference, since it is quite as important that justice shall be fearlessly and impartially administered in courts of inferior jurisdiction as in those of superior jurisdiction. But the power to punish for the constructive contempt in the court of superior jurisdiction originated in a fiction, and was for a purpose that has no analogy in our government.

In a recent case, The Queen v. Sepoy, 8th Queen's Bench, 134, 4th Moak, 250, the respondent was arrested on an attachment for contempt for writting a letter, which was published in a local newspaper, charging the judge of a county court with falsehood. Cockburn, C. J., in delivering the opinion of the court, among other things, said: "The power to commit for contempt is fully gone into by Blackstone and Hankins; but though this power is recognized in the superior court, it is nowhere said that an inferior court of record has any power to proceed for contempt out of court, and this is an obvious distinction between the superior and other courts of record. In the case of the superior courts at Westminiter, which represent the one superior court of the land, this power was coeval with their original constitution, and has always been exercised by them. These courts originally were carved out of the one supreme court, and were all divisions of the *aula regis*, where it is said the king in person dispensed justice, and their power for committing for contempt was an emanation of the royal authority, for any contempt of the court would be a contempt of the sovereign. But it is a very different matter with respect to the county courts, and similar inferior courts of record. No case can be found in which such a power has ever been exercised by an inferior court of record, or, at all events, upheld by the decision of the superior court."

The theory of government requiring royalty to be invested with an imaginary perfection which forbids question or discussion is diametrically opposed to our theory of popular government, in which the utmost latitude and freedom in the discussion of business affecting the public, and the conduct of those who fill positions of public trust, that is consistent with truth and decency, are not only allowable, but essential to the public welfare.

The common law mode of proceeding in cases of contempt presents no question of fact to be tried by a jury. The defendant determines by his own answer, under oath, whether he is guilty of that which is charged against him as a contempt of court, and if he fails thereby to purge himself, the court may at once impose the punishment.

The law of libel at common law left the jury to determine whether the defendent was guilty of the publication alone; but the question of whether the publication was libelous was for the court, and it was admissible to show by evidence that the publication was true, or the motive with which the publication was made. Whether, therefore, the party charged with the libel was tried by a jury or proceeded against summarily as for contempt, the only question of fact was, whether he was guilty of the publication.

In this state, however, our constitution guarantees "that every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty; and, in all trials for libel, both civil and criminal, the truth, when published with good motives and justifiable ends, shall be a sufficient defence.

This language, plain and explicit as it is, can not be held to have no application to courts or those by whom they are conducted. The judiciary is elective, and the jurors, although appointed, are in general appointed by a board whose members are elected by popular vote. There is, therefore, the same responsibility, in theory, in the judicial department that exists in the legislative and executive departments to the people for the diligent and faithful discharge of all duties enjoined on it; and the same necessity for public information with regard to the conduct and character of those entrusted to discharge those duties, in order that the elective franchise shall be intelligently exercised, as obtains in regard to the other departments of the government.

When it is conceded that the guarantee of this clause of the constitution extends to words spoken or published in regard to judicial conduct and character, it would seem necessarily to follow that the defendant has the right to make a defence which can only be properly tried by a jury, and which the judge of a court, especially if he is himself the subject of the publication, is unfitted to try.

Entertaining these views, the judgment of the court below must be reversed and the respondent discharged.

Guaranties of County Warrants.

SMELTZER v. WHITE.

Supreme Court of the United States, October Term, 1875.

1. Extent of Guaranty.—An express guaranty of the genuineness and regularity of issue, of county warrants, extends to the want of a seal, when such is necessary to their validity.

2. Estoppel.—The purchaser having brought suit against the county on the warrants, and having been defeated on account of the want of a seal, *semble*, that the guarantor is estopped by such judgments, and they are conclusive.

3. Nature of Defect.—The purchaser in this case held not bound to know that the law required county warrants to be sealed, as such a want was not a patent defect equally within the knowledge of both vendor and vendee.

4. Return of Property.—Where a vendee relies upon an express warranty, and sues upon it, he may recover the damages sustained by him, through its breach, without returning or tendering back the property.

5. Value of Defective Warrants.—Where warrants are not drawn as required by law, the county treasurer having thereby no authority to pay them, the presumption is that they have no value, and it would be error to give the jury instructions based upon the idea that they had any value whatever.

In error to the Circuit Court of the United States for the District of Iowa.

Mr. Justice STRONG delivered the opinion of the court.

All the assignments of error, but one, are founded upon exceptions taken to the charge of the circuit judge. They are numerous, and many of them do not conform to the rules of this court or to the exceptions which were actually taken. Without examining them separately, we shall consider the legal questions they present, so far as they have any bearing upon the case.

The suit was founded upon express guaranties of the genuineness and regularity of issue of county warrants; guaranties which the plaintiff alleged had been broken. He had sued the county to recover the amount of the warrants, and had been defeated, for the general reasons that the seal of the county had not been attached to the warrants, and that under the laws of Iowa, as held by the court, the warrants were invalid unless they bore the impress of the county seal. In the present suit against the guarantor, the circuit judge instructed the jury that the guarantees covered the defect of the want of the county seal upon the warrants, and that inasmuch as they did not bear the seal, (the fact having been decided in the suit against the county), the guaranty was broken, and the defendant was liable. To this instruction several objections are now urged. It is said, first, that the warrants were genuine and regularly issued, even though they did not bear the impress of the county seal; that the statutes of the state did not require that county warrants should be sealed with the county seal. This, we think, is clearly a mistake. Prior to 1860, the county judge had the management of the business of the county, with the usual powers and jurisdiction of county commissioners, and the county funds could be paid out by the treasurer only upon warrants issued by him. Rev. Stat. of Iowa, 241, 243, 260. It was made his duty "to admit all claims against the county; to draw, and seal with the county seal, all warrants on the treasurer for money to be paid out of the county treasury." Code, 106. The treasurer was authorized to pay only warrants thus drawn and sealed. The language of the statute was, and it still is, "The treasurer shall disburse the same (the county money) on warrants drawn and signed by the county judge, and sealed with the county seal, and not otherwise." In 1860, the powers and duties of the county judge in this respect were transferred to a county board of supervisors (Act of March 22, 1860, Rev. sec. 312, *et seq.*,) and the clerk of the district court was constituted their clerk, and required to sign all orders issued by the board. Now, as the treasurer can pay no orders or warrants unless they are sealed with the county seal, and as all warrants are required to be sealed by the county judge until 1860, when the board of supervisors was charged with his duties, (except that their warrants are required to be signed by their clerk), it is very evident that no warrant is a genuine county warrant which is unsealed with the county seal. The statute expressly requires the board of supervisors, in all cases where the powers conferred by the act upon the board had been before exercised by the county judges, to conduct their proceedings under said powers in the same way and manner as had been provided by law in such cases for the proceedings of the county judge. Rev. sec. 325. It is too clear, therefore, for debate, that the genuineness and regularity of issue of county warrants can exist only in cases when the warrants are sealed with the county seal. And so it has been decided by the Supreme Court of Iowa substantially, both in Prescott v. Gouser, 34 Iowa, 178, and in Springer v. The County of Clay, 35 Iowa, 243. It is next contended that the circuit court mistook the extent of the guaranty. The contention is that a guaranty that the warrants were "genuine and regularly issued" meant only that they were not forgeries, that they were not issued without consideration, and that they were ordered by the proper officers. To this we can not assent. It is true, even of a technical guaranty, that its words are to be construed as strongly against the guarantor as the sense will admit. Drummond v. Prestman, 12 Wheaton, 515. Such also is the English rule. Wood v. Prestner, Law Rep. 2 Ex. 66; Mason v. Pritchard, 12 East, 227. So it has been held that in construing a guaranty, it is proper to look at the surrounding circumstances in order to discover the subject-matter the parties had in view, and thus to ascertain the scope and object of the guaranty. Sheffield v. Meadows, L. R. 4 C. P. 595. Now, if this principle be applied to the present case, it is easy to see what the parties intended. The plaintiff was a citizen of Maryland. He purchased the alleged warrants from the defendant, a citizen of Iowa. He may be presumed to have had no actual knowledge of what constituted genuineness and regularity of issue of Iowa county warrants. What was necessary for him to be assured of was that the instruments he proposed to purchase were valid and legal claims against the county; claims which might be enforced by law. In view of this, the construction contended for by the defendant is utterly inadmissible. And even without this, the language of the guaranties admits of no other construction than that which the court below gave to it. Under the law of the state, there could be no genuine county warrants regularly issued, imposing a liability upon the county, which were not duly sealed. The treasurer was bound to pay those only that were genuine and issued according to the requirements of the law.

Again, it is urged on behalf of the defendant, that the plaintiff was bound to know, or must be presumed to have known, that the law required county warrants to be sealed with the county seal, and that, as the defect was apparent on the face of the instruments sold and guaranteed, the guaranties must be construed as not covering a patent defect. It is said it can not be admitted the defendant intended to guaranty any thing more than the existence of facts of which the guarantee had no knowledge. To this it may be answered that the absence of a proper seal upon the instruments guaranteed was not a patent defect equally within the knowledge of the plaintiff and defendant. Whether the instruments required a seal or not, and what the seal should be in order to constitute them genuine county warrants, regularly issued, depended upon the statute laws of Iowa, of which, it may be presumed, the plaintiff had no actual knowledge, and that for this reason he desired a warranty. Having exacted one, it is a necessary deduction from it that it was taken as a protection against his own ignorance of Iowa law. It was well said on the argument that the only warranty that would protect him against loss, in case it should turn out that the county officers neglected to comply with the law prescribing the mode in which county warrants should be executed and issued, would be a warranty co-extensive with the defences to which such instruments were subject in suits against the counties, founded upon non-compliance with the state law on the part of the county officers. We can have no doubt that the true meaning of the guaranties is that the guarantor undertook that the paper was not subject to any defence in suits against the county founded upon any want of legal form, either in the signatures or seals, and we think the absence of the proper seal was a breach of the warranty, rendering the defendant liable for the loss which the plaintiff sustained thereby.

It is next urged by the defendant, that the circuit court erred in holding him estopped by the judgments rendered in the plaintiff's suits against the county. This assignment rests upon a mistake of facts. The court did not so rule. And had such ruling been made, it would have been harmless. The warrants were in evidence, and they exhibited the fact, not contradicted, that they were not sealed as the law required. They were, therefore, not genuine county warrants regularly issued, and it was the duty of the court so to declare them. The defendant's contract was broken as soon as it was made, and the plaintiff was entitled to a verdict, no matter whether the judgments in the suits against the county were conclusive or not. It would, therefore, be idle to discuss the question whether the court below would have fallen into error had the jury been instructed that the former judgments were conclusive. The question is impertinent to this case. We may, however, simply refer to some decisions which tend strongly to show that those judgments were in law conclusive upon the defendant, especially as he had seasonable notice of the defences set up by the county in the plaintiff's suit on the warrants, and was required to assist in the prosecution of the claims. Carpenter v. Pier, 30 Vt. 81; Lovejoy v. Murray, 3 Wall. 18; Walker v. Ferrin, 4 Vt. 529; Chicago v. Robbins, 4 Wall. 658; Clarke v. Carrington, 7 Cranch, 322; Drummond v. Preston, 12 Wheat. 515.

The fifth assignment is, that the court erred in overruling the defendant's offer to show that the warrants were regularly issued for legal claims against the county. The offer, we think, was correctly overruled. The evidence proposed had no relevancy to the issue in the case. That the warrants were issued for debts due by the county was of no importance if they were not genuine, and in the form that the law required, to enable the holder to set them up as legitimate claims against the county. What availed it to the plaintiff that the county owed the sums of money mentioned in the warrants, if the warrants were nullities? His only means of recovering the money was through the warrants.

The instruction given respecting the measure of damages is not open to any just exception. It was as follows: "The amount which the plaintiff paid the defendant for the warrants is *prima facie* evidence of their value at the time, and there is also the evidence of the defendant that they were sold by him to the plaintiff, for their market value, based on the assumption that they were valid, and there is no other or different evidence on the subject of value. I therefore instruct you, the plaintiff is entitled to recover * * * the amount of the consideration which he paid and the defendant received therefor, (for the warrants), with six per cent. interest per annum on such amount." No other rule for the measure of damages could have been given to the jury. See Eaton v. Mellus, 7 Gray, 573.

It is contended, however, that the court erred in refusing to charge as requested, that there could be no recovery without a return of the warrants, and in charging as follows: "It is not necessary thus to recover that the plaintiff should, before suit was brought, have tendered back the warrants mentioned in said written guaranties. It is enough that they are in court at the trial, and the court can order them to be retained, and on payment of the judgment rendered herein, to be delivered to the defendant."

This instruction was in strict accordance with all the well-considered decisions. In case of a breach of warranty, the person to whom the warranty has been given may sue without a return of the goods. He is not obliged to rescind the sale. Thus the law is stated by Kent, 4 Com. 480. In Man. Co. v. Gardner, 10 Cush. 83, the Supreme Court of Massachusetts ruled that a vendee may sue for a breach of warranty, without returning the goods. And such is the rule in England. Fielder v. Starkin, 1 Hen. Blackstone, 17; Pateshall v. Tranter, 3 Ad. & Ellis, 103. It is true that when a vendee seeks to rescind the contract of sale, he must return the property or tender it, but when he relies upon an express warranty and sues upon it, he may recover the damages sustained by its breach without returning or tendering the property. This we understand to be the universal rule. There is, then, no just ground of complaint that the circuit judge charged as he did upon this subject, and much less that he added it was enough that the warrants were in court and could be impounded for delivery to the defendant. If any one could complain of this last declaration, it was the plaintiff, and not the defendant.

What we have said sufficiently disposes of all the assignments of error, except the eleventh and twelfth. The eleventh is to the refusal of the court to charge as requested by the defendant's third prayer, which was that "if the jury should find from the evidence that the warrants were regularly issued by order of the several boards of supervisors directing the same, for a valid and subsisting indebtedness by said counties respectively, for the several amounts thereof, and that the plaintiff has not at any time offered to return them, he could only recover the difference between their value without the county seal, and their value with said seal at the time of the several sales, and interest." The fourth instruction asked for, but refused, was "that the several assignments of the warrants carried with them the right to sue and recover the several demands for which they were issued; that if the plaintiff has retained the warrants, without any offer to return them, until the right of action upon the original indebtedness is barred by the statute of limitations, and the right of the holder to affix the county seal to the warrant is also barred by the statute, the jury should find for the defendants."

Of these it may be remarked, in addition to what we have said of the supposed obligation of the plaintiff to return the warrants before bringing his suit on the warranties, that there was no evidence whatever that the unsealed warrants had any value. The fair presumption is that they had none, since they were not drawn as the law required, and since the county treasurer had no authority to pay them. It would, therefore, have been error had the court submitted to the jury to find that they had a value, and to deduct it from what their value would have been had they been genuine warrants regularly issued.

The plaintiff, as we have seen, was a citizen of Maryland. Buying, as he supposed, Iowa county warrants, and ignorant of their necessary form, he took from the seller an engagement that the subjects of his purchase were such warrants, genuine and regularly issued. He had a right to rest upon that engagement. It was not his duty to enquire farther. Assuming that it was possible when he took the warrants to procure the impress of the county seal upon them, he was under no obligation to procure it. And there is no evidence that he discovered the instruments were not what the defendant warranted them to be until May 14, 1870, when in his suit against the counties, they were adjudged void. Then it was too late to obtain, if they ever could have been obtained, regular warrants, or to obtain the impress of the county seal upon those he held. The right to require the affixing of the seal ceased, under the statutes of Iowa, at the expiration of three years from the issue of the warrants. That period had expired before 1870. The right of action on the original claims against the counties was barred at the end of five years from the time it accrued, and all the warrants were dated more than five years before they were adjudged void. The right of action on the original claim against the counties, even if it did pass to the plaintiff by the assignments of the unsealed warrants, was gone, therefore, when he discovered that the defendant's guaranty was broken, and consequently the defendant suffered no loss by not being remitted to the possession of the warrants then, or subsequently. Before that time, there can be no pretence that the plaintiff should have returned them. From this it follows very plainly that the third and fourth requests to the circuit court could not have been properly granted.

The judgment is affirmed.

Foreign Selections.

THE PUNCTUALITY OF RAILWAY COMPANIES.—It is of importance at once to examine and appreciate the effect of the considered and written judgment of the Court of Appeal in Le Blanche v. London and Northwestern Railway Company, 24 W. R. 808. The case falls into two branches. First. It is now ruled that where there is a statement in railway time-tables that "every attention will be paid to insure punctuality," and also a negative condition that "the company will not be responsible for loss or injury arising from unpunctuality," the court will imply an affirmative contract to insure punctuality, so far as preventible causes are concerned, and will limit the negative condition to cases of inevitable accident. As to this, the court of appeal, by three voices to two, affirmed the unanimous judgment of the common pleas division. 24 W. R. 396. Secondly. When the contract "that every attention will be paid to insure punctuality" has been broken, and a passenger has in consequence missed a train in correspondence with the contracting company, the passenger is not entitled as of right to take a special train and charge the contracting company with the loss of it. As to this, the court of appeal unanimously reversed the decision of the divisional court of appeal from inferior courts, which had given "leave to appeal" under the 45th section of the judicature act of 1873.

It will be necessary to state the facts at some little length, both with a view to a proper examination of the case itself, and to show that the case is absolutely one "of the first impression," if we except the ruling of Crompton, J., at *Nisi Prius*, in Prevost v. Great Eastern Railway Company, 13 L. T. N. S. 21, in which that learned judge held that the words "every exertion will be used to insure punctuality, but the departure or arrival of trains at the time stated will not be guaranteed," meant that "the company will use proper care and not be negligent." Of the other cases cited in argument, none has any bearing on either of the points raised. Phillips v. Clark, 5 W. R. 582, and Peninsular and Oriental Company v. Shand, 18 W. R. 1049, had nothing to do with punctuality, and in Hamlin v. Great Northern Railway Company, 5 W. R. 76, the only case referred to in the judgments, the defendants had not run an unpunctual train, but a company in correspondence with the defendants' company had "changed their arrangements," and had run no train (as advertised by the defendants), at all. That this constitutes a clear breach of contract had already been decided by the leading case of Denton v. Great Northern Railway Company, 4 W. R. 240.

The facts, then, were as follows: The plaintiff took a through ticket from Liverpool to Scarborough. This route lay over lines owned, worked or otherwise liable to be interfered with, by seven different companies, but from Liverpool to Leeds the line was worked by the defendants. The time-tables of the defendants represented that the plaintiff's train would leave Liverpool at 2 P. M., and reach Leeds at 5 P. M., and that a train in correspondence therewith would leave Leeds at 5: 20 and reach Scarborough at 7: 30. The defendants' train in fact reached Leeds at 5: 27 instead of 5, the corresponding train having left Leeds seven minutes before. The plaintiff proceeded by the next train to York, and finding that the next train for Scarborough would arrive at 10 o'clock, he took a special train, by which he arrived at Scarborough between 8: 30 and 9 o'clock. The delay between Liverpool and Leeds was found as a fact by the county court judge to have been caused by the negligence of the defendants. The total actual delay of the defendants on their own line was twenty-seven minutes. The total possible delay to the plaintiff in arriving at Scarborough would have been two hours and a half—the time between 7: 30 P. M. and 10 P. M. This delay was reduced by the special train to three-quarters of an hour, so that the time saved by the special train was about an hour and a quarter. The special train cost £11. 10s., and the county court judge at Bloomsbury, sitting without a jury, had held that the plaintiff might recover this amount from the defendants.

As to the effect of the condition, which we believe follows a common form, adopted with scarcely any variation by all the companies in England, we should be inclined to agree with the majority of the court without hesitation, if it were not for the fact, dwelt upon with much force by Baggallay, J. A., that the railway between Liverpool and Scarborough was subject to the control of so many different companies. As the learned judge observes, "it is obvious to how many possible causes of accidental delay a through train was subject, and it is not immaterial to observe that in so complicated a system, a delay of very trifling duration in its origin might, in the result, occasion one of very considerable importance." Moreover, the negative part of the contract is plain and decisive, whereas the affirmative part of it is not unaptly described by Cleasby, B., as a "vague assurance." But unless the "vague assurance" was intended to mean something, why did the company put it in? By construing it as it was construed by the majority court, we give effect to the whole contract, and avoid the difficulty of holding a contract good which absolves the company from liability for their own negligence. If the delay were caused by the necessities of a complicated traffic, the company would not be liable. Whether it was or not seems to be a question of evidence, and there appears to have been some evidence upon which the county court judge was justified in finding that the "servants of the company had been guilty of reckless loitering." Upon this particular contract, therefore, we think the company were properly held liable. But it is well to enquire what would have been the result if the "vague assurance" had been omitted, and the company had been able to rely unchecked upon a strong negative disavowal of liability. The question of the reasonableness of the contract would not arise, for the carriage of passengers is not within the 7th section of the Railway and Canal Traffic Act, 1854, although the carriage of passengers' luggage is (Cohen v. South-Eastern Railway Company, 24 W. R. 522, L. R. 1 Ex. D. 217), for that section applies only to "animals, articles, goods and things." Mellish, L. J., put this point in argument when he asked (p. 809), "Can the company say they will be liable for no negligence, as, for instance, that if a passenger's leg is broken by their negligence, they will not pay for it?" This appears to have been answered in Macaulay v. Furness Railway Company, 21 W. R. 140, L. R. 8 Q. B. 57, where a drover was carried "at his own risk" and injured by the negligence of the company, but (on demurrer) was held not entitled to recover. "Negligence, even gross negligence," said Quain, J., in that case, "is the very thing which the contract stipulates that the defendants would not be liable for." *A fortiori*, therefore, would a railway company be able to contract themselves out of a liability for unpunctuality. If nothing is said about punctuality at all, the contract would merely be to deliver the passenger in a reasonable time, and looking to the changes and chances of every railway journey, it is hard to see how a belated passenger could make out his case.

With regard to the second point, the right to take a special train, it seems clear that no such right existed. It was supposed to follow from Hamlin v. The Great Northern Railway Company, 5 W. R. 76. There the plaintiff took a ticket from London to Hull, and on arriving at

Grimsby, found no train (as advertised) to Hull. He did not post on to Hull, but slept at Grimsby, and the delay caused him considerable expense. Alderson, B., said that he might have posted and charged the expense upon the company, and added that the "principle is that if the party does not perform his contract, the other may do it for him as near as may be, and charge the expense for so doing." But the *dictum* of Alderson, B., as to the post-chaise, is clearly extra-judicial, and it is said in the considered judgment of the court that "cases of this kind are to be decided with reference to the peculiar circumstances which belong to each." Now in Hamlin's case the plaintiff was a taylor; he was journeying on business, and he was delayed in his business three or four days. In the case recently decided by the court of appeal, the plaintiff was a private gentleman; he was traveling for pleasure, and he was delayed in his pleasure one hour and a quarter. To state the two cases is to show the evident distinction between them. Is, then, a belated tourist entitled to nominal damages only for the breach of contract to "pay every attention to insure punctuality"? This point is still technically left open by the late decision, as the plaintiff consented to a verdict for a shilling in preference to taking the new trial which the court of appeal offered him. But it is thus practically solved by Mellish, L.J. "The question," says that learned judge, "in my opinion, which the county court judge ought to have considered is whether, according to the ordinary habits of society, a gentleman in the position of the plaintiff, who was going to Scarborough for the purposes of amusement, and who missed his train at York, would take a special train from York to Scarborough *at his own cost* in order that he might arrive at Scarborough an hour or an hour and a half sooner than he would do if he waited at York for the next ordinary train." Only an extravagant person would have taken a special train. But "any expenditure which, according to the ordinary habits of society, a person who is delayed in his journey would naturally incur *at his own cost*, if he had no company to look to, he ought to be allowed to incur at the cost of the company." —[*Solicitor's Journal.*

Adhesion to Judicial Precedent.—"Precedents are the bane and disgrace of legislation. They are not wanted to justify right measures, and are absolutely insufficient to excuse wrong ones. They can only be useful to heralds, dancing masters and gentlemen ushers, because in these departments, neither reason, virtue, nor the *salus populi* or *suprema lex*, can have any operation." Thus writes Laurence Sterne; but in our opinion, there is not in the whole science of law a principle of more vital consequence than that which upholds the sanctity of judicial precedent, even, as of old, it conferred upon the *Responsa Prudentium*, among the Romans, authority binding on posterity. For when it is remembered that, in the words of Best, C. J., "The judgments of the courts of Westminster Hall are the only authority that we have for by far the greatest part of the law of England," can anything be conceived more calculated to shake public confidence in the stability of law, more certain to engender social disaster, than would be the habitual disregard by the judges of previous decisions pronounced by judges of co-ordinate jurisdiction. Unquestionably, the inconvenience of shaking concluded determinations is much greater to the kingdom in general than the impropriety of any former original determination can be to the parties. And, we need hardly add, that, in the words of Lord Kenyon, "The maxim *misera est servitus ubi jus est vagum aut incertum*, applies with peculiar force to questions respecting real property." To the same effect Ashurst, J., observes: "One would always wish that the law were certain upon all subjects, but it is more emphatically important that it should be so in questions concerning real property. The decisions of the law are the great landmarks for the safety and regulation of real property. And perhaps it is of less importance how the law is determined than that it should be determinate and certain; and such determinations should be adhered to, for then every man may know how the law is." Disregard of settled authority in such cases, Lord Macclesfield, also, used to call removing landmarks, and that it is often of little consequence how a point is determined at first, so it be but adhered to, was his favorite maxim. Lord Cowper before him, expressed himself as of the same way of thinking; and Lord King afterwards adopted the same sentiments. So, in Nixon's Estate, 9 Ir. L. T. R. 32, Christian, L. J., declared: "It is better that the law should be certain than that it should be abstractly correct:" while in another case, Pennefather, B., said: "Uniformity, perhaps, is of more importance than extreme accuracy of construction." At the same time, it must be admitted that in the words of Whiteside, C. J., "Cases are only valuable as far as they expound principles." See note to Trench v. Nolan, 6 Ir. L. T. R. 114. For, as Sir William Jones so eloquently observes: "If law be a science, and really deserves so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of reason." But, once a judicial decision has been established on principle, it should be accepted as conclusive by all courts of co-ordinate jurisdiction; and so above all, we repeat, in cases affecting real property, respecting which a point of law once settled, answers Virgil's

"Limes agro positus, litem ut discerneret arvis."

We have been led to refer to this subject by the cases of Shearman v. Kelly, and Murphy v. M'Cormick, reported in our present issue (10 Ir. L. T. R. 112), which, while in a remarkable degree suggestive of the evils that might ensue from a disregard of the principle upn which the binding efficacy of judicial precedents is based, at the same time illustrate one of the exceptions to which the general doctrine is subject, it being there held that the Court of Queen's Bench was not concluded by the previous decision of the Exchequer in Earl Fitzwilliam v. Dillon, 9 Ir. L. T. R. 106, inasmuch as no appeal lay from the decision of the Exchequer. Indeed, it would be impossible to cite a stronger instance of the application of this exception to the general rule, as Fitzwilliam v. Dillon, was itself decided on an appeal, from the chairman's decision, brought before the court on a case stated; as that decision vitally affected the tenure of land in Ireland; as to follow that decision would have been in favor of possession; and as the immediate result of a conflict of decisions would be to place the law affecting the tenure of land in a strange state of perplexity and uncertainty. Suppose a similar question comes before the common pleas; we presume that court would feel bound by the latest decision, *i. e.*, of the Queen's Bench, which is fortified by its being subject to appeal. The judges of the common pleas, who may have thus followed Shearman v. Kelly, either against or according to their own convictions, may afterwards sit with the Barons of the Exchequer on the appeal from Shearman v. Kelly, whereupon, the Barons of the Exchequer (four) can reverse the decision of the Queen's Bench, even though the judges of the common pleas (three) should be in favor of upholding it; while, if the judges of the common pleas happen to have previously felt themselves bound to follow the Queen's Bench decision against their own conviction, and on the appeal join in reversing it, they will be thereby also overruling their own decision Moreover, should the first appeal be brought from such a decision of the common pleas, the four Barons of the Exchequer, and the one dissentient judge of the Queen's Bench can reverse it, and at the same time overrule the Queen's Bench decision. And yet it must be presumed, notwithstanding these probabilities, amounting almost to a moral certainty, that the law declared by the Queen's Bench will be reversed by the Exchequer Chamber as now constituted, that law, laid down by three as against five judges, must, until reversed, govern the relations of landlord and tenant in Ireland in connection with ejectments on notice to quit; while, already, in Campion v. Campion, 8 Ir. L. T. R. 148, we were apprised by Morris, J., that "the process of the recovery of the possession of land for non-payment of rent has been judicially paralyzed" by Billing v. Arnold, which was founded on the necessity of following Keene v. M'Blaine—both which cases, on the other hand, Morris, J., on his part, declared he would be prepared not to follow. *Quot homines tot sententiæ.* It may be that some one will now be actually bold enough to insist that the Exchequer is not bound by its own decision—that, on the contrary, it is bound by that of the Queen's Bench. No doubt, Dowse, B., intimated that, so far as his court was concerned, the question was conclusively settled. But there are cases which might be cited as authorities to the contrary, in which courts have held themselves not irrevocably bound to follow even their own prior decisions. Williams v. Lear, L. R. 7 Q. B. 287; Allen v. Bonnett, L. R. 6 Eq. 522; *Ex parte* Birley, *re* Easdale, 8 Ir. L. T. R. 212; Dowling v. Adams, 11 Ir. Jur. (N. S.) 289; Bland v. Carville, 8 Ir. Jur. (N. S.) 6; Smith v. Manby, 1 Vict. Rep. L. 168. But, on this subject, we would venture to quote a passage from a judgment pronounced by Barry, A. C. J., and Williams, J., in another recent Australian case: "Courts of concurrent jurisdiction, such as those of the master of the rolls and the vice-chancellors, and the courts of Queen's Bench, common pleas, and Exchequer (from each of which, in the exercise of their ordinary jurisdiction, an appeal lies) respect, but do not necessarily follow, the decisions of the co-ordinate courts, until affirmed on appeal, but they do not directly overrule their own judgments. Power v. Hayne, L. R. 8 Eq. 270; Collins v. Lewis, L. R. 8 Eq. 708; Attorney-General v. Cambridge Consumers' Gas Company, L. R. 6 Eq. Ca. 296; *In re* East of England Banking Company, L. R. 6 Eq. 379; Cory v. Patton, L. R. 7 Q. B. 309. The rule prevails in the court of criminal appeal also. Alderson, B., and Wightman, J., each avowed his concurrence in the judgment of the court, not agreeing with the cases cited, but bound by them. Roebuck's Case, 1 D. & B. 37. And in The Queen v. Robinson, L. R. 1 C. C. 82; Reg. v. Scott, was cited from 2 D. & B. 47, with the remark that the case was not entirely satisfactory to the profession, whereupon Kelly, C. B., observed: "We have no means of reviewing that decision. We are the same court, and the court of the 15 judges is a court of the same jurisdiction, not a superior one." Instances have occurred in which the courts of Queen's Bench in sessions cases, the court of common pleas in registration cases, and in matters relating to the railway, canal, and traffic act; and the Court of Exchequer in matters of revenue, have departed from prior decisions. Those are cases in which each court exercises a peculiar jurisdiction, where there is no appeal, as there is here. Each court has justified the exceptional exercise of the privilege, on the ground of palpable oversight or omission to notice the governing principle which should have regulated the former judgment. Hadfield's Case, L. R. 8. C. P. 313. We conceive the safest guide to be that of *stare decisis*, as laid down by Lord Kenyon in Goodtitle v. Otway, 7 T. R. 419, and, recognizing the extreme inconvenience likely to arise, were our decisions to oscillate and vary, without any assurance to the suitors that the law, as expounded last year, would be the law in this, we ourselves, in Ettershank v. The Queen, 4 A. J. R. 132, avowed the like binding operation on us of former decisions, and stated that any review of the previous judgments of this court must take place in a higher tribunal. The appeal will be dismissed." 5 A. J. R. 16. We may add that there is a class of cases, *ex. g.*, where it rests wholly in the discretion of the court how it shall decide, in which a court may well hold itself unfettered by previous decision. In such a case the late Chief Baron Pigot once observed: "With respect to the authorities cited, I wish to take this opportunity of utterly disclaiming being governed by any decided case upon a matter of this kind. It is mischievous that courts should create for themselves a set of fetters by which they should tie up their hands, or, rather, which created a series of excuses for courts not adjudicating upon the matter brought before them according to its particular circumstances."

In Ireland, we have had before now many instances of unhappy con-

flicts of judicial decision, not merely on various familiar matters of practice, but upon questions of the most serious consequence. We need hardly do more than refer to the recent cases of Cassidy v. Moore, 10 Ir. L. T. R. 77, as opposed to Lutton v. Thompson, 9 Ib. 205; and Kavanaugh v. Dolan, 10 Ib. 80, as opposed to Dowling v. Byrne, Ib. 79, and Byrne v. Ring, Ib. 82. By-the-by, the three conflicting decisions lastly mentioned were cited in our metropolitan police court, on the 11th instant, in —— v. Monks, and so puzzled the worthy presiding magistrate that he has naturally had to reserve his decision. And in like manner the conflicting decisions of Shearman v. Kelly, and Earl Fitzwilliam v. Dillon—upon an enactment the structure of which, in the words of Whiteside, C. J., "demonstrates that certainty of application was the intent of the makers of the law, that certainty in its operation was aimed at, and conformity to its provisions enforced, even by unusual penalties"—have already proved a source of perplexity at quarter sessions, in some cases before the learned chairman of Tipperary, on the 6th instant (Buckley v. Keilly, and others, noted in another column), in which the result has been that over thirty ejectments have been adjourned till January, 1877, while the landlord has to pay the costs, amounting, probably, to some fifty or sixty pounds; liberty being reserved for him to console himself with the reflections of Goldsmith's "man in black," who, when told that he had Salkeld and Ventris in his favor, but that Coke and Hale looked the other way, and that there was scant likelihood of a speedy adjudication under the circumstances, satisfied himself by observing, "It is the boast of an Englishman that his property is secure, and all the world will grant that a deliberate administration of justice is the best way to secure his property. Why have we so many lawyers, but to secure our property? Why so many formalities, but to secure our property? Not less than one hundred thousand families live in opulence, elegance and ease, merely by securing our property." Be it so; but verily, under existing circumstances, it is difficult indeed for legal advisers to guide their clients among the quicksands of such conflicting authorities, and we fear that suitors will have but too much reason to say, as the man in Terence does to his lawyers:—"*Fecistis probe; incertior sum multo quam dudum.*" Would only that some one might discover in "magnetism" an aid to the science of legal judgment, improving on the hint suggested by Mr. W. Forbes Johnson, Q. C., in his "Essay on the Science of Law":—"If our law were cultivated as the other sciences are, it would be seen that equity stands in the same relation to precedent that magnetism does to the mariner's compass; and, for aught we know, that sense of justice which is common to all mankind may be the reflection in the human mind of that very force."—[*Irish Law Times.*

Queries and Answers.

[In order to save space, queries inserted in the JOURNAL will hereafter be numbered during the year. In answering queries, correspondents are requested to give the number of the query answered.]

QUERY.

14. Promissory Note—Protest.—The note, a copy of which with the endorsements is attached, was received by the bank two days after the third day of grace had expired. Should it be presented for payment, and if refused, protested for non-payment? If so, what would be the objects accomplished by so doing? SUB.

$250.00. 6-22-76.

Four months after date, we promise to pay to the order of John Doe, $250.00 at bank, for value received without defalcation or discount, and without any relief whatever, from valuation or Appraisment Laws, with 12 per cent. interest from maturity until paid.

Signed. ROE & Co.

Endorsed. Jno. Doe, Jno. James. Protest waived, Jno. Jones. Pay bank or order, for account of C. Nat. Bk., Klimber, Mo.

C. SMUCK, Cashier.

ANSWER.

13. Validity of Printed Signature.—I think, Mr. Editor, that you answered that query rather hastily in your editorial note. Directions in a charter that ordinances shall be signed, are generally held to be directory merely, unless the signature is plainly made essential. See, 1 Dillon Municipal Corp. 2d ed. section 265, and notes. C.

MOLINE, ALA.

Correspondence.

[Editors CENTRAL LAW JOURNAL.]

CRIMINAL LAW—PRESUMPTION OF MALICE AND INSANITY.

My attention has been called by an article in the current number of the Journal (CENT. L. J. Vol. 3, No. 30), to a subject to which I have given some thought, and which may be worth a passing remark. The reviewer of Best on Evidence, takes occasion to indulge in some strictures on Stokes v. The People, 53 N. Y. 164, which apply, at least so far as relates to the plea of *self-defence*, to the late adjudications in this state. See State v. Felter, 32 Ia. 49; State v. Morphy, 33 Ia. 270; State v. Porter, 34 Ia. 131. What the reviewer means by "murder in fact," as distinguishable from "murder in law," I am hardly able to determine, especially so, as "murder" is always a conclusion of law upon the facts, and hence is always "in law," and never "in fact." The only thing "in fact" is the killing, and it becomes murder "in law" when the circumstances which surround and color the act fill the legal measure. If he means to say that the standard is too low, then I have no controversy with him, as that is a question for the legislature.

But he seems further to lament the fact that an accused person "should escape punishment, because the state fails to be able to prove that the accused intended to do the act proven on him." I know not what rules of evidence or procedure the writer would erect, but it seems to me that this would not be a bad state of affairs. It is an old rule, that the state, to convict in a criminal prosecution, must prove every material averment of the indictment. In the first place, the law declares what *indicia* shall characterize the criminal act. These must be charged in the indictment, and proved, as above stated. Now, if the intent to do the act is an essential element of the crime, the state must allege and prove it. Murder is defined to be "the killing of a human being, with malice aforethought." Malice is defined to be the intentional doing of a wrongful act without just cause or excuse. State v. Hays, 23 Mo. 287; Bromage v. Prosser, 4 Barn. & Cress. 255. How then can the state make out a case without proof of the intent with which the act is done. The state has not done enough when it has shown the "fact of killing;" from this the law does not imply malice, although I am not ignorant of the decisions to the contrary. "Malice," if it exists, is a state of mind of the accused—a fact, and as such the subject of proof. Being a question of fact, it is for the jury, to be inferred from the manner of the killing and the circumstances surrounding it. The theory that "malice" is a presumption of law from the "fact of killing," is radically inconsistent with the presumption of the defendant's innocence; for the *killing* being granted, but the *murder* denied, the defendant is put upon his trial under a presumption of guilt. Followed to its logical sequence, it would require a verdict of guilty, whether the state introduced any evidence or not.

The Supreme Court of Iowa has adopted a rational rule in cases where the plea is self-defence. It is that the absence of self-defence must be shown by the state. See State v. Morphy, and State v. Porter, *supra*. It would be consistent if it held the same rule when the defence is insanity, as there is certainly no principle that would distinguish the cases. Here, however, the rule is held requiring the defence, relying upon the plea, to establish it by a preponderance of the evidence. See State v. Felter, 32 Ia. 50. What sound legal reason for the distinction exists, I am unable to conjecture. The court would gravely instruct the jury as follows: "You must, if you find the defendant guilty, so find to the exclusion of every reasonable doubt; but in this case the defendant relies upon the defence of insanity; so upon that issue the burden of proof is with him, and to avail him, he must establish it by a preponderance of the evidence, and if he fails to so establish it, you will find him guilty."

Now, insanity goes to the mental capacity of the defendant; unless he is sane, he is not guilty. Whatever reasonable doubts of his sanity there are, are reasonable doubts of his guilt. If the evidence of his sanity, and of his insanity, should exactly equiponderate, then of course there would not only be a multitude of reasonable *doubts* of his sanity, but his insanity would be as reasonably certain as his sanity. Still, in that case, under the doctrine of State v. Felter, *supra*, the jury should convict. This, it seems to me, is contrary to the whole theory of our criminal law. The Supreme Court of Nebraska, in the case of Wright v. The People, May term, 1876, announce the correct doctrine. They say: "Where, in a criminal case, the accused relies upon insanity as a defence, the burden of proof is on the prosecution to show sanity. 2. In sustaining such a defence, where there is testimony to rebut the legal presumption that the accused was sane, unless the jury are satisfied beyond a reasonable doubt, that the act complained of was not produced by mental disease, they must acquit."

This position, it seems to me, is most reasonable and sound on principle. Whenever evidence is introduced that "*tends*" to establish the defence, then we may well hold the legal presumption of sanity rebutted, for it is only a "tendency," and that the *onus* upon that issue lies upon the state. J. B. WHITE.

ADEL, IOWA.

A CORRECTION—BAIL BOND V. CAPIAS.

[Editors CENTRAL LAW JOURNAL.]

In your edition of August 4th, in the article headed "Attachment Laws," you have made a mistake of fact. You say: "In the criminal court of this city, last week, an application was made to discharge from custody a prisoner who had been arrested on a writ of *capias* issued from the state of New York in a suit for false imprisonment. The application was granted, the judge holding that a defendant was not liable to arrest in this state, on foreign process founded on a civil action." It seems almost needless to say that no such proceeding as is above indicated, did take place, or could have taken place. As, however, the question actually raised was one that is new in this state, it may interest your readers to present a correct statement of it. One Thomas was arrested in New York in a civil suit, and gave a bail bond with two securities. He then, to use a phrase borrowed from the criminal dialect, jumped his bail and came to this state. His bail, for the purpose of exonerating themselves, procured a duly certified and authenticated copy of the bail bond, and, by authority of that document, came to this state, arrested Thomas, and lodged him in jail, preparatory to taking him back to New York and surrendering him there. The application for his discharge was made to the judge of the criminal court, by whom it was granted. The question whether a bail has a right, at any time, to take his principal, even in another state, without any other authority than the bail bond, has never, to my knowledge, been raised in this state. In New

York, Connecticut, Massachusetts, Tennessee, Pennsylvania, and some other states, the question has been raised, and, by a uniform current of decisions, the right of a bail to take his principal in any state has been upheld. The principle upon which the decisions rest is, that by the consent of the principal, the bail has become his jailor, and he is presumed to be always in his custody; so that the bail may at any time change the constructive custody into an actual custody. The judge of the criminal court held, that if Thomas had been arrested, and given bail on a criminal charge in New York, the bail would have been justified in taking him in this state. But as his arrest was on civil process in that state, the bail had no rights over him in this state. ZETA.

Notes of Recent Decisions.

Bigamy—Statute of Limitations.—*Gise v. Commonwealth.* Supreme Court of Penn. 6 Pittsburg Leg. Journal, 193. Opinion by Paxson, J. The statute of limitations is a bar to an indictment for bigamy. It commences to run from the time of the second marriage.

Parol Evidence of Fraud.—*Kastenbader v. Peters.* Supreme Court of Penn. 33 Legal Intelligencer, 266. Opinion by Paxson, J. Parol evidence is admissible to prove fraud or mistake in written instrument, and the rejection of such evidence is error.

Constitutional Law—Enacting Clause of Statute.—*State v. Rogers.* Supreme Court of Nevada. 3 Am. L. T. Rep. 339. Opinion by Hawley, C. J. The provision of the section 23, art. 4, of the constitution of Nevada, that the enacting clause of every law shall be as follows: "The People of the State of Nevada represented in Senate and Assembly, do enact as follows," is mandatory. The omission of the words "Senate and" from the enacting clause of an act of the legislature renders the act unconstitutional and void.

Nuisance—Blacksmith Shop.—*Raub v. Tamany et al.* Common Pleas, Pa. 3 Monthly West. Jurist, 208. Opinion by Walker, J. 1. The erection of a blacksmith shop in a town and city. is not a nuisance *per se*. See also, Hilliard on Injunctions, 270, 272; New Boston Coal Co. v. Pottsville Water Co., 4 P. F. S. 164; Richard's Appeal, 7 P. F. Smith, 105; Campbell v. Scott, 11 Sem. 39; Butler v. Rogers, 1 Stockton, 487, and Rhoads v. Dunbar, 7 P. F. S. 274, where the whole matter is reviewed. See also Dunning v. City of Aurora *et al.*, 40 Ill. 481, and Att'y-gen. v. Nichol, 16 Ves. 338.

Measure of Damage for Land taken by Railroad.—*Penn. & N. Y. Canal & R. R. Co. v. Bunnell.* Supreme Court of Penn. 8 Chicago Leg. News, 359. Opinion by Sharswood, J. 1. The measure of damages for land taken by a railroad is the difference between the market value of the property before, and after, the construction of the road, so far as that difference was caused by the construction. 2. The market value of land is not a question of science and skill, upon which only an expert can give an opinion. 3. Evidence as to the price offered and paid for other property in the neighborhood should not be received.

Public Highway—Rights and Duties of Public—Use of Vehicle Moved by Steam Power.—*Macumber v. Nichols.* Supreme Court of Michigan. Opinion by Cooley, C. J. The use of steam power for purposes of locomotion on the common highways is not unlawful, provided due care is observed, and a proper regard had to the rights of others. The fact that one, for a lawful purpose, takes into the highway an object which is calculated to frighten horses of ordinary gentleness does not necessarily render him liable for any resulting injury. Those who make use of the highway by means of horses have no rights superior to others, and new modes of locomotion are perfectly admissible, provided they are reasonably consistent with existing modes. If injury results, the question of liability is a question whether reasonable care has been observed; and this is a question of fact, and must be submitted to the jury as such.

Contingent Fee—Claim against Government—Public Policy.—*Burbridge v. Fackler.* Supreme Court of the District of Columbia. Wash. Law. Rep. June 3, 1876. A contract for a contingent fee for the collection of a claim against the United States is not necessarily void. The parties entered into a contract in the following words: This agreement made between Mrs. Jane C. Fackler, of Danville, state of Kentucky, of the first part, and S. G. Burbridge, of Covington, Kentucky, of the second part, witnesseth: that the party of the first part employs the party of the second part as her attorney, to collect a claim against the United States for Q. M. stores as *per* claim, amount $1,150.00, and in consideration of the services of the party of the second part, the party of the first part hereby agrees to pay the party of the second part an amount equal to one-half of whatever sum of money may be collected from the United States on said claim. Dated this——day of——, 187—. JANE C. FACKLER. [L. S.] *Held*, that the contract was valid and could be enforced in equity.

Compromise of Family Disputes — Equity Jurisdiction — Specific Performance.—*Wistar's Appeal.* Supreme Court of Penn. 2 Weekly Notes, 613. Agreements for the compromise of family disputes are regarded favorably, and will be supported in equity. But the agreement must be complete in itself, and must show that the minds of the parties have come together and been in accord upon all the material terms of the settlement. Where an agreement provided that certain of the parties, in addition to receiving $40,000 in full settlement, "should retain the devises and bequests contained in their aunt's will," but made no mention of the disposition of the accretions of income since the testatrix's death, *Held*, that although, by a technical construction, the accumulated income would follow the principal of the "devises and bequests," yet, as it did not appear that the point had been in contemplation of the parties at the time, the agreement was not such a complete and clear settlement of disputes as equity would assume jurisdiction of to enforce specifically.

Nuncupative Will—Illinois Statute.—*Harrington et al v. Stees et al.* Supreme Court of Illinois. 3 Monthly West. Jurist, 249. Opinion by Dickey, J. 1. At common law it was not essential to the validity of a nuncupative will, that the testator should have been sick at all. The statute is in this regard, a limitation of the common law powers. 2. The words "in the time of his last sickness," had no technical signification at the time of the passage of the statute, and are to be taken in their ordinary signification. 3. The words "in the time of his last sickness," are not to be construed to mean *in extremis*. If a person in the sickness of which he subsequently dies, impressed with the probability of approaching death, deliberately makes his will, in conformity to the statute, the will will not be invalid because, in point of fact, he had time and opportunity to reduce it to writing. 4. It was not improper conduct, or undue influence, to suggest to the testator, that if he had any arrangements to make in regard to his temporal affairs, he had better do so at once. 5. The statute requires, that the testator shall, at the time of pronouncing the words of his will, desire the persons present, or some of them, to bear witness that such words are his will, *or words to that effect*. The last phrase of this statute was intended to do away with all formal objections as to the mode of manifesting a desire that the persons should be witnesses. That desire is as unequivocally manifested by the response "yes" to a direct question put to the testator as if he had declared his wish never so formally.

Foreign Garnishment.—*Allen et al. v. Watt.* Supreme Court of Illinois. 8 Chicago Leg. News, 355. Opinion by Breese, J. 1. Full faith and credit must be given in Illinois, to judicial proceedings in Ohio. 2. The fact that a debt has been sued for, or that a judgment has been rendered in such suit, does not prevent the defendant from being garnisheed by a creditor of the plaintiff, even in another state. 3. When such garnishment proceeding is in another state, the garnishee is not bound to disclose there the fact of the pendency of the suit, or of the judgment against him in this state, unless, by statute in the former state, such matter is made a defence in the mouth of a garnishee. 4. Such garnishment in a sister state may be pleaded to the action in this state; if the latter suit has proceeded to judgment, the defendant may protect himself by injunction. 5. Watt, being defendant at the suit of W. & P., in the superior court, pleaded that since the last continuance, Allen & Ellis, who were creditors of his, had paid part of the debt sued for, under a garnishment proceeding brought by W. & P. in Ohio. *Held*, that on an application by A. and E. to stop the levy of an execution issued by Watt against them, on a judgment for the same debt in the circuit court, Watt is estopped to dispute the propriety and validity of the payment in Ohio, and its operation as a discharge of his judgment in the circuit court.

Contract in Restraint of Trade—Combination of Grain Buyers.—*Craft et al. v. McConoughly.* Supreme Court of Illinois. 3 Monthly West. Jurist, 233. Opinion by Craig, J. 1. A compact entered into by the grain merchants of a town, to regulate the price of grain, storage, etc., and to distribute the aggregate profits *pro rata* among the parties to the compact, is in restraint of trade, and a court of equity will not lend its aid to enforce an account and distribution of profits. 2. An agreement in general restraint of trade is contrary to public policy, illegal and void; but an agreement in partial or particular restraint upon trade has been held good where the restraint was only partial, consideration adequate and the restraint reasonable. This subject was ably discussed in the leading case of Mitchell v. Reynolds, 1 P. Wms. 181. See also, 1 Smith's Lead. Cases, 172 and notes, and the rule of law established, which has been followed and adhered to in numerous cases since. In reference to the point, what might be regarded a reasonable restraint, numerous cases might be cited, but what was said in Horner v. Graves, 7 Bing. 743 will illustrate the principle. Tindall, C. J., said: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection as to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatsoever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and if oppressive, it is, in the eye of the law, unreasonable. What is injurious to the public interest is void, on the ground of public policy. If, therefore, the restraint imposed by the contract in question was but partial, as insisted upon by the complainant, as it was unreasonable, oppressive and injurious to the public, it can not be sanctioned in a court of equity. While the parties were in business, in competition with each other, they had the undoubted right to establish their own rates for grain stored and commissions for shipment and sale. They could pay as high or low a price for grain as they saw proper, and as they could make contracts with the producer. So long as competition was free, the interest of the public was safe, the laws of trade, in connection with the vigor of competition, was all the guarantee the public required; but the secret combination created by this contract destroyed all competition, and created a monopoly against which the public interest had no protection. Morris Run. Coal Co. v. Barclay Coal Co., 68 Pa. St. 173. 3. A court of equity will not lend its aid in the division of the profits of an illegal transaction between associates. Neustadt v. Hall, 58 Ill. 172; Skeels v. Phillips, 54 Ill. 309; Jerome v. Bigelow, 66 Ill. 452.

Recent Decisions in Illinois.

From the advance sheets of 78 Illinois Reports.

Mistake—Correcting Attachment Bond.—*Craft v. Dickens*, p. 131. A court of equity will not assume jurisdiction to reform an attachment bond for a mistake, as the party complaining had an ample remedy at law to have the same corrected in the court where the attachment was pending.

Negligence in Railway Company.—*Ind. & St. Louis R. R. v. Smith*, p. 112. It is negligence in a railway company to permit or suffer weeds or anything else to grow upon its right of way to such a height as to materially obstruct the view of a highway crossing, and if injury results to stock at such crossing, that might have been avoided but for such obstruction, the company will be liable.

Swamp Lands.—*Keeler v. Brickey*, p. 133. 1. Under the act of Congress of September 28, 1850, the title to the swamp and overflowed lands of the United States within this state, unsold, was vested *ipso facto* in the state of Illinois, and a patent for a tract of such land, made by the United States after the passage of that act, passes no title. 2. It is not necessary, to constitute swamp and overflowed land within the meaning of the act of Congress, that it should be overflowed annually. It is sufficient if it is subject to overflow, requiring artificial means to subject it to beneficial use.

Failure of Consideration.—*Winkleman v. Choteau et al.*, p. 107. 1. Where A executed his promissory note, payable to B, and delivered it to C, for the purpose of having it discounted, and C delivered the same to B, but B paid nothing for it, *Held*, that there was a failure of consideration, and that B could not recover in a suit on the note against A. 2. And the fact that A was indebted to B at the time of giving the note to him, and that B told C to collect the note, and give the firm of which B was a member credit for it, will not entitle C to recover on the same, where it appears that the note was not given on account of the indebtedness of A to B.

Judgment of Another State—Bankruptcy—Fraud.—*Horner v. Spelman et al.*, p. 206. 1. Where a transcript of a judgment in a court of another state is certified by the clerk of the court, and the presiding judge certifies that the attestation is in due form, it is a substantial compliance with the act of Congress of May 26, 1790. 2. It is not error to exclude a certificate of bankruptcy offered in evidence by the defendant, where the same has not been pleaded. 3. A discharge in bankruptcy is no defence to a suit on a judgment, which was for the "covins, frauds, wrongs and injuries" committed by the bankrupt defendant.

Dower—Damages for Detention.—*Simpson v. Ham*, p. 203. 1. On a petition for the assignment of dower, the court has complete jurisdiction, when it has assigned, to cause the widow's damages to be assessed for the detention of her dower; and when she elects to proceed by petition under the statute, and has her dower assigned, she can not then abandon that proceeding and invoke the aid of a court of chancery to take an account of the *mesne* profits. Her remedy in the proceeding by petition is full and complete, and she should pursue it then, and if she fails to do so, she will be deemed to have waived it. 2. If the court rules erroneously, in refusing to assess the widow's damages in a proceeding by partition for the assignment of dower, under the statute, the remedy is by appeal, and not by a bill in chancery.

Parol Contract for Lease of Lands—When not Void.—*Wheeler v. Frankenthal et al.*, p. 124. 1. A parol contract, which is required to be in writing by the Statute of Frauds, where the parties treat it as obligatory until executed, is not void; and such a contract may also be available for some purposes in equity, or in an action, in some instances, to recover on a *quantum meruit*. 2. A parol contract within the provisions of the Statute of Frauds can not be made the ground of a defence any more than of an action. 3. A parol agreement, made in July, for the leasing of land, the term to commence on the first day of August following, and continue for one year thereafter, is within the first section of the Statute of Frauds, and void at law. 4. Part performance of a verbal contract within the Statute of Frauds has no effect, at law, to take the case out of its provisions. This can only be done in equity.

Sale of Goods by Sample.—*Webster et al. v. Granger et al.*, p. 231. 1. Delivery of goods sold is not necessary to pass title, as between the parties to the sale. 2. Where goods in the hands of a carrier are sold by sample, and a delivery ticket in the form of an order, by the proper railroad or station agent, to deliver the goods therein described to the person therein named, or bearer, is delivered to the purchaser, with a sample, the title to the goods is thereby completely vested in the purchaser, and if they are afterwards destroyed, it is his loss, and he is liable for the price agreed on. 3. There can be no custom giving a purchaser by sample, 24 hours, or any other time, to examine the goods. He purchases by sample, and if the goods do not prove equal to the sample, he may return them, or sue for and recover the difference.

Garnishment—Money Transferred before Service, and Held for Transferee.—*Johnson v. Pace*, p. 143. Where a school teacher, being indebted, drew an order on the treasurer of the school district for the sum he was entitled to receive, in favor of his creditor, which was accepted by the board of directors on condition he completed his contract, and the creditor, on the back of the order, authorized the secretary to draw the money for him, which he did, as agent for the creditor, on orders drawn in favor of the teacher before the time limited in the order for payment, and before he was garnished by another creditor of the teacher, *Held*, that such agent was not liable to the garnishee process, as the money in his hands at the time did not belong to the teacher, but was held as the agent for the first-named creditor.

Injunction Bond—Undertaking of Surety Strictly Construed.—*Ovington v. Smith et al.*, p. 250. 1. The undertaking of a surety on an injunction bond must be strictly construed, and he can not be held liable beyond the precise terms of his undertaking. 2. An injunction bond was given to two parties, who were enjoined, and the condition was, that the obligors should pay to said two parties all damages that might be awarded against the complainant on the dissolution of the injunction, and the injunction was dissolved as to one of the defendants, and damages assessed in his favor against the complainant. In a suit brought on the injunction bond against the surety, to recover the amount of the damages so assessed, it was *held* he was not liable, his undertaking being to pay to the two parties damages upon the dissolution of the injunction as to both of them, and not to one upon the dissolution of the injunction as to him alone.

Administration—Whether Money is held by Party as Executor or Administrator.—*Weir v. The People*, p. 192. Where the administrator of an estate qualifies as executor of the will of the sole heir and distributee of his intestate, the receipt of money by him as administrator, after the debts of the intestate are paid, will be regarded as paid to himself, as executor, without any order of court for that purpose, or the giving of any refunding bond, and therefore, after his death, the surety on his bond, as administrator, will not be liable for such money. 2. After the death of the administrator and executor, and the appointment of an administrator *de bonis non* of the estate of which he was executor, it is not in the power of the administrator *de bonis non*, by settling with the sureties on the executor's bond, to affect the rights of the surety on the bond of the same person, as administrator, and thereby change the liability that rested upon the sureties in the bond of the deceased party as executor, to the surety on his bond as administrator.

Relative Weight of Positive and Negative Evidence.—*City of Greenville v. Henry*, p. 150. On the trial of an action against a city to recover for an injury received from a defect in a culvert, the court instructed the jury: "that positive evidence is entitled to more weight than negative evidence; and that if twelve men were in a room where there was a clock, and one of them should swear he heard the clock strike, and the eleven should swear they did not hear it strike, then the jury, in such a case, should give a judgment for one against the eleven; and if Henry Alfred and Mrs. Gibson swear they saw a hole in the culvert in question, and twice as many witnesses, equally as credible, say they did not see holes in the culvert, then positive evidence should be taken by the jury:" *Held*, that the instruction was objectionable, and not apt as an illustration, as it omitted the element of the reasonableness of the fact testified to.

Continuance—Sufficient Cause.—*May v. The State*, p. 212. A defendant was indicted for a crime, and employed and paid an attorney, and was tried, and the jury failed to agree, and he was remanded to jail, and there remained for several weeks, when he was again brought into court, and then, for the first time, notified that his attorney had abandoned his case, and it was set for trial on the next day, and he then had *subpœnas* issued for witnesses, and on the next day, when the case was called for trial, he made a motion for a continuance, supported by an affidavit showing these facts, and showing also, that he had relied upon his attorney to prepare his case for a second trial, and that he did not know that the attorney had abandoned the case until notified of it in open court the day before; that, as soon as notified of it, he had *subpœnas* issued for witnesses, giving their names and residences, and stating what facts he expected to prove by them, which facts were material and necessary to a proper defence, and, that owing to the shortness of the time intervening between his ascertaining that his attorney had abandoned the case, and the time of its being called for trial, the witnesses had not been found. *Held*, that sufficient diligence was shown, and the continuance should have been granted.

Composition Agreement—Construction of.—*Lipman v. Lowitz*, p. 252. 1. A composition agreement should not receive a construction more comprehensive than the reasonable import of its language would signify, and should be limited in its effect to such matters as were within the contemplation and intention of the parties at the time of its execution. 2. An agreement by which a creditor agrees to take 25 per cent. on each and every dollar that his debtor owes and is indebted to him, in full discharge and satisfaction of the several debts and sums of money that the debtor owes and stands indebted to him, does not affect any debts which may afterwards accrue to the creditor. 3. Where a creditor held several notes of his debtor, and endorsed one of them to a third party, and afterwards, and whilst said endorsed note belonged to the endorsee, made a composition agreement with his debtor, whereby he released and discharged him from all debts and sums of money then due and owing from such debtor to him, stating the aggregate amount of such indebtedness, *Held*, that this agreement would not affect the right of the creditor to collect from the debtor whatever sum he might afterwards have to pay, as endorser of the note so endorsed before the execution of the composition agreement. 4. And in such case it would not affect the right of recovery of such endorser as against the maker, that the former paid the note to the endorsee by giving his own note therefor instead of paying the money.

Principal and Surety—Ratification—Contribution.—*Paul v. Berry*, p. 158. 1. Where several persons execute a promissory note, there will be no presumption that the first signer, or any other number less than the whole, is, or are principal, or principals, and the other co-securities, but the fact rests in evidence *aliunde* to determine the relation they sustain towards each other. 2. Where a father executes a promissory note, and signs his son's name thereto as principal, and procures others to sign as sureties, and the son afterwards ratifies the act by suffering judgment to go against him on the note, with full knowledge that it is claimed he is principal, he can not maintain a suit against the sureties for contribution. 3. Where it is established by proof that two or more persons are co-sureties, and one of them pays the debt for which they are liable, he may have contribution from the others to the extent they are thereby relieved. 4. It is also well settled, that co-sureties may, by agreement among themselves, so far sever their unity of interest and obligation, as to terminate the right of contribution. 5. Where a person's name is signed to a promissory note without his authority, he may ratify its execution and acknowledge its binding validity upon him, and when this is done, his relation to the note will be precisely the same as if he had executed it personally. 6. If a father, executing a note, signs his son's name, and procures others to become sureties, what he says to the sureties at the time of their signing, as to the son being a principal with him, is competent evidence, as a part of the *res gestæ*, where the son afterwards ratifies the execution of the note. By such ratification, with a knowledge of the facts, the son makes the acts and declarations of the father his own.

Notes of Recent English Decisions.

Vendor and Purchaser—Statute of Frauds—Description of Parties to Contract—Estoppel.—*Thomas v. Brown.* High Court, Q. B. Div. 24 Weekly Rep. 821. The plaintiff signed a contract for the purchase of a leasehold house of defendant written on the back of the particulars and conditions of sale, acknowleding having purchased the property and paid a deposit; the contract was also signed by the auctioneer "as agent for the vendor." The abstract of the title was forwarded to the plaintiff's solicitor and the title deeds examined, upon which requisitions were made and answered. The plaintiff refused to complete the purchase, and brought this action for the recovery of the deposit. *Held*, that the description "vendor" was insufficient, but that the plaintiff was estopped by her conduct from repudiating the contract, and could not recover her deposit in her own default. Sale v. Lambert, 22 W. R. 478, L. R. 18 Eq. 1, and Potter v. Duffield, 22 W. R. 585, L. R. 18 Eq. 4, observed upon.

Sale of Fixtures—Statute of Frauds.—*Lee v. Gaskell.* High Court, Q. B. Div. 24 Weekly Rep. 824. Tenant's fixtures of greater value than £10 were sold by the tenant's trustee in bankruptcy to the plaintiff, and re-sold by the plaintiff to the defendant, who was the landlord of the premises. *Held*, that no memorandum in writing of the second sale was necessary under the statute of frauds, it being neither a sale of an interest in land within section 4, nor of goods and chattels within section 17. Cockburn, C. J. "I think the case of Hallen v. Runder, 1 C. M. & R. 266, is directly in point and is an authority binding on us here. But on principle I think Hallen v. Runder was quite rightly decided. Fixtures are, as long as they are unsevered, part of the freehold, and in disposing of them to the landlord, or any one else, you can not treat them as chattels, because they are not chattels. And in Hallen v. Runder it was quite rightly decided that you could not bring an action for the price of fixtures as for goods sold and delivered, because they are not goods; all you can do with regard to fixtures is to make a bargain and sale of them as fixtures, subject to the right of the tenant to remove them on the one hand, and to the liability to lose them, if he does not, on the other. This is so in the case of a sale to third persons, and it is the same in the case of a sale to the landlord. There is an analogy, but I think a remote one, to growing crops; but there is an obvious distinction between the two things, the latter being sown for the very purpose, when they are at maturity, of being removed; whereas the very contrary is the case with regard to fixtures."

Right of Retainer.—*Jones v. Evans.* High Court, 24 Weekly Rep. 778. A creditor of the testator proved his debt in the cause after decree, and subsequently bequeathed it to the executrix. *Held*, that the right of retainer did not arise in respect of such debt, but that the executrix merely acquired the benefit of the creditor's proof.

Absolute Devise of Land—Power of Selection—Power Exercised—Selection Waived—Land Originally Selected Sold by Trustees—Death of Devisee.—*Littledale v. Bickersteth.* High Court of Chancery, 24 Weekly Rep. 507. A widow by will devised an acre of land, which was "to be selected by" the devisee, to a clergyman absolutely, and devised all her other real estate to the trustees of her will upon trust to convert it into money. By a letter to the clergyman, dated the day her will was executed, but not intended to be, and not in fact, delivered to him until after her death, she said that it would be "gratifying to her memory" if he of his "own free will" would dedicate the said acre of land as a site for a church. He did select an acre for that purpose, but subsequently entered into an arrangement with the trustees of her will, whereby the trustees sold the acre so selected, and granted him permission to select another acre in lieu thereof. The clergyman died without having selected another acre. *Held*, that the permission to make a second selection was *ultra vires*, and that the purchase-money produced by the acre originally selected belonged to the personal representatives of the clergyman absolutely.

Solicitor—Client's Money—Unauthorised Investments—Insufficient Security—Liability of Solicitor—Solicitor's Right to Benefit of Security—Rights of Prior and Subsequent Mortgagees.—*Sawyer v. Goodwin.* Court of Appeal, 24 Weekly Rep. 493. A solicitor invested, without authority, various sums of money belonging to clients on the security of fourth and subsequent mortgages on a freehold estate, and afterwards absconded. In a creditor's suit for the administration of the estate of G., a deceased partner of the solicitor, the fourth mortgagees, believing their security insufficient, proved for their whole mortgaged debt, and received a dividend amounting to 5s. in the pound. Afterwards the freehold estate was found to be sufficient to pay the fourth mortgagees in full. On summons taken out by G.'s executors, *Held*, (reversing the decision of Hall, V. C.), that the case came within the ordinary rule of equity that, if a solicitor improperly invests money belonging to a client, and afterwards re-places it, he is entitled to the benefit of the supposed insufficient security; and therefore that the dividend which had been received by the fourth mortgagees, did not enure to the benefit of the subsequent mortgagees, but must be re-paid to G.'s executors for the benefit of his general creditors.

Transfer of Goods for Purpose of Fraud—Fraudulent Purpose not Carried Out—Right of Transferee to Recover Goods.—*Taylor v. Bowers*, Court of Appeal, 24 Weekly Rep. 499. Money paid or goods delivered for an illegal purpose may be recovered back before that purpose is carried out, notwithstanding that the party seeking to recover may be compelled to allege that his purpose in making such payment or delivery was illegal. If, however, the illegal purpose has been carried out, he can not recover by alleging its illegality. T., in order to defraud his creditors, transferred all his goods to A., who agreed, after applying part thereof in paying to T.'s creditors a composition of 1*s.* in the pound, to return the remainder. T. represented to B., one of his creditors, that this transfer was *bona fide*, but B. was aware of its real nature. A., acting without T.'s authority or knowledge, gave to B. as security for his debt a bill of sale on T.'s goods, which was duly registered, and under which B. took possession of the goods. The composition with T.'s creditors was not effected, and T. brought an action against B. to recover his goods, and obtained a verdict in his favor. B. thereupon obtained a rule *nisi* calling on T. to show cause why the verdict should not be set aside upon the ground that he could not recover the goods by the allegation of his own fraud. This rule was discharged by the Queen's Bench Division, and B. appealed. *Held*, (affirming the decision of the Queen's Bench Division), that T. was entitled to a verdict.

Specific Performance—Verbal Contract—Agent.—*Smith v. Webster.* Court of Appeal. 24 W. R. 894. The defendant having verbally arranged with the plaintiff for the sale to him of a house for the sum of £950, intrusted a solicitor to prepare a formal agreement. The solicitor thereupon sent a draft agreement to the plaintiff's solicitor for perusal and approval, accompanied by a letter stating the terms of the arrangement, but the agreement was never signed by the parties. *Held*, reversing the decision of the court below, that the letter of the defendant's solicitor was not a note or memorandum of the agreement within the 4th section of the Statute of Frauds, the solicitor not being an agent authorized to sign such a note or memorandum within that section.

Contract—Sold Note—Personal Liability of Broker.—*Southwell v. Bowditch.* Court of Appeal. 24 W. R. 838. The defendant, a broker, signed and sent to the plaintiff a note of a contract in the following terms:—"I have this day sold by your order and for your account to my principals, about five tons of antracene.—W. A. Bowditch." *Held*, reversing the decision of the common pleas division, that the defendant was not personally liable for the price of the goods. Humphrey v. Dale, 6 W. R. 854, E. B. & E. 1004, discussed.

Charter-party—Right to Rescind—Breach.—*Tully v. Hawling.* High Court. 24 W. R. 845. The plaintiff chartered a vessel from the defendant "for twelve months, for as many consecutive voyages as the vessel can enter upon after completion of the present voyage from S. to L." The vessel completed the voyage on which she was then engaged on March 23, and was then detained as unseaworthy by the board of trade under the Merchant Shipping Act, 1873. The vessel was repaired, and tendered to the plaintiff for loading on June 17. *Held*, that the breach of the contract by the defendant in not having the vessel ready to load at the time specified in the charter-party was such as justified the plaintiff in rescinding the contract.

Will—Gift to Illegitimate Children.—*Child en Ventre sa Mere. Crook v. Hill.* High Court. 24 W. R. 876. There is no objection on the ground of public policy against a gift to an illegitimate child already pro-created. A testator, whose daughter M. had gone through the form of marriage with J., her deceased sister's husband, made his will at a time when M., to his knowledge, had two children by J., and was again *enceinte*. By his will the testator gave leaseholds upon trust for M. for life, with remainder to her children as she should appoint, and in default, to her child or children in the usual way. M. appointed to the children living at the date of the will, the child of which she was then *enceinte*, and a child conceived and born afterwards. The House of Lords having held that the children born at the date of the will were sufficiently designated as the objects of the testator's bounty, it was now *held*, that the child *en ventre sa mere* at the date of the will was also entitled to take.

Will—Inconsistent Bequests.—*In re Bagshaw's Trusts.* High Court. 24 W. R. 875. B. bequeathed his furniture, etc., moneys, securities for money, shares, and all and singular his other personal estate to his wife, absolutely, and for her own sole and separate use. In a subsequent paragraph of his will he gave the residue of his personal estate to trustees upon trust for his children, and in default of children, for his brothers and sisters. *Held*, that the gift to the wife was cut down to a life interest by the subsequent dispositions.

Guarantee—Distinction between Suretyship for Floating Balance and for Ascertained Debt.—*Ellis et al. v. Emmanuel et al.* Court of Appeal. 24 W. R. 832. Where a surety has given a continuing guarantee, limited in amount, to secure the floating balance which may, from time to time, be due from the principal to the creditor, the guarantee is, as between the surety and the creditor, to be construed both at law and equity, as applicable to a part only of the debt, co-extensive with the amount of his guarantee; but where the suretyship, limited in amount, is for a debt already ascertained which exceeds that limit, it is not *prima facie* to be construed as a security for part of the debt only. In such a case, it is a question of construction on which the court is to say whether the intention was to guarantee the whole debt, with a limitation on the liability of the surety, or to guarantee a part of the debt only. Gray v. Seckham, 20 W. R. 437, L. R. 7 Ch. 680, and the cases there followed, discussed and distinguished.

Bill of Lading—Latent or Patent Damage—Foreign Law.—*Moore et al. v. Harris.* House of Lords. 24 W. R. 887. 1. Certain packages to be delivered, under bill of lading, "from the ship's deck, where the ship's responsibility shall cease, at the port of M. * * * unto the Grand Trunk Railway Company, and by them to be forwarded thence per railway to the station nearest to T., and at the aforesaid station delivered to Messrs. M. & Co., or to their assigns." By the same instrument it was provided as follows:—"No damage that can be insured against will be paid for, nor will any claim whatever be admitted, unless made before the goods are removed." *Held*, that the removal referred to was removal from the railway station, up to which time the responsibility of the ship-owner continued; but that the condition applied as well to latent as apparent damage, and therefore the plaintiff's remedy was barred for loss of the value of the packages which had been injured by the neighborhood of chloride of lime. 2. An English contract made in England, by the master of an English ship, can not be affected by considerations of principles derived from foreign law as to *laches* or delay.

Counsel and Client—Authority of Counsel to Bind Client by Consent.—*Holt v. Jesse.* High Court. 24 W. R. 879. An order was made by consent in the presence of the defendant, his solicitor and counsel. Upon an application by the defendant to set aside the order, on the grounds that he had never consented to it; that his counsel had no authority to do so; that he had not himself understood it; and that so soon as he did understand it he repudiated it, he court, being of opinion that the defendant had understood the order at the time it was made, refused to set it aside.

Covenant to Settle—Gift by Will with Variation in Trust.—*Romaine v. Onslow.* High Court, 24 W. R. 899. Upon the marriage of his daughter, A. covenanted to give an equal share of his estate upon the trusts declared in her marriage settlement. By his will he left such equal share to persons other than the trustees of the settlement, upon trusts for the benefit of his daughter. The trusts of the will differed from those of the settlement by giving the first life interest to the wife instead of the husband (giving her only a power to appoint by will to her husband for life), and also by giving a power of appointment among children to the wife alone, instead of to the husband and wife jointly. The investment clauses were also different. *Held*, that the gift by will was in satisfaction of the covenant, and the funds were ordered to be transferred to the trustees of the settlement upon the trusts thereof.

Legal News and Notes.

—A REMARK made recently by the lord chief justice of England with reference to the issues and service of a writ, without the usual preliminary of a solicitor's letter, deserves to be noted. The fact having been brought under his notice during the trial of a cause, he condemned the solicitor's conduct in the matter, observing "that nothing could justify such a course but absolute necessity."—[*New Zealand Jurist.*

—THE LAW OF TRAMPS.—The Supreme Court of Maine has decided that it is a violation of the constitution of the United States to send tramps and general vagrants to the workhouse, as it deprives them of liberty, without due process of law; and says the court, "if white men and women may thus summarily be disposed of at the north, of course black ones may be disposed of in the same way at the south. Thus the very evil which it was particularly the object of the fourteenth amendment to eradicate will still exist."

—SIR H. MAINE, in his most recent work, suggests a common origin to Hindoo law and to the Brehon laws; and among other notable similarities, he comments on the practice of "sitting in *Dharna*," as recognized alike in both systems. The practice is this: A person having, or alleging, a claim against another for a debt or wrong would go to the house of his adversary, and sit at the door, neither eating, nor drinking, nor sleeping until the adversary made reparation. The theory, of course, was that if the party, against whom redress was thus sought, allowed the sitter to die, neither in this world nor in the next would there be any peace or communion with fellow-men or fellow-spirits for him. The fear of so terrible a doom operated to bring the party to terms, and the sitter came off triumphant. It seems that the practice still lives in India, although the advance of ideas probably tends to impair its efficacy. It is stated that there has lately occurred in Allahabad a case which brought the Vedic superstition and the penal code into amusing contact. A Brahman of the Brahmans desired something of his adversary—a debt, a concession, or what not. His importunities being of no avail, he at last avowed his intention of sitting in *Dharna* at the door of the other, until his demand should be complied with, or Heaven should release him from his sufferings, and cast the blood of the holy upon the head of the obdurate. The operation becoming tedious after a time, and the unreasonable one being still hardened in his unreason, the thrice-born leaped into the village well. Seized, doubtless, with terror and remorse, his opponent rushed forth to the mouth of the well. With hands clasped and contrite tones, he besought his injured victim to avail himself of the ready rope thrown down to save him. At last the holy man consented; his whilom enemy caught him gladly when he landed, and made him over to the police on a charge of attempting to commit suicide. —[*London Law Journal.*

—SERVING A DEAD MAN.—The following is a *verbatim* copy of a summons, and return of the sheriff thereon, in a justice's court in a suit lately pending in Sparta, Wis.:

MONROE COUNTY, } ss.
Town of Sparta, }

The state of Wisconsin to the Sheriff or any Constable of said county:

You are hereby commanded to summon A. Weigand, if he shall be found within your county, to appear before the undersigned, one of the Justices of the Peace in and for said county, at my office in said town, on the 10th day of September, A. D. 1875, at 9 o'clock in the forenoon, to answer to Isaac Tuteur, plaintiff, to his damage two hundred dollars or under. Hereof fail not at your peril.

Given under my hand, this 3d day of September, 1875.

SAMUEL HOYT,
Justice of the Peace.

MONROE COUNTY, ss.

I, Geo. B. Robinson, Deputy Sheriff of said county, do certify that I have been to the defendant's usual place of abode, and find he is dead, and so I left a copy at his last and final abode in my county, to-wit: *on his grave*, in the town of Ridgeville, he not leaving any family or funds behind. He leaves this world without a cent, and has gone where the plaintiff can't sell him whisky. Alas! Tuteur is out, and Weigand is dead!

C. W. MCMILLAN, Sheriff.
By GEO. B. ROBINSON, Deputy.

Service and cop.	$ 25
Travel, forty miles.	4 00
	$4 25

—A CORRESPONDENT of the London *Times* gives the following cheerful account of legal procedure in the Windward Isles: The laws throughout the islands of Vincent, Grenada, St. Lucia, and Tobago, are in a state of the most extraordinary confusion. Originally drawn by unskilful hands, they have in some cases not been revised or consolidated for nearly fifty years. To add to the difficulty of ascertaining what the law is on any subject, it will not unfrequently be found that the laws are out of print. A difficult system of law and procedure prevails in each island, and writs of the supreme court of one island do not run in any of the others. This affords extraordinary facilities for fraud. A dishonest debtor, once he leaves the island where his liabilities were contracted, can set his creditors at defiance, although he may not be thirty miles distant from them. The trouble and expense of pursuing him through the other islands deter them from attempting to obtain redress. In none of the Windward Islands except Barbadoes, is there any bankruptcy law. It is a common occurrence for men to be imprisoned for years for paltry debts. All legal proceedings are attended with extravagant expense and protracted delay. To take the simplest case. If the holder of an overdue bill of exchange for any sum over £20, sues the acceptor of it, he can not obtain judgment under the most favorable circumstances in less than four months, even if the action be undefended, and then not without the intervention of a jury to assess the amount of interest accrued on the bill since it became overdue. In such a case the costs will amount at least to £15. The present complicated and cumbrous procedure, and the great expense attendant on it, practically close the courts of law to all but the wealthy. In St. Vincent, it is two years since any civil case was tried before a jury. Although the courts are seldom open, and there is little work for the chief justices to do, they are not allowed to do it. In each island there are a number of assistant justices. These officials are peculiar to the islands of St. Vincent, Grenada and Tobago. They are unknown in any other part of the West Indies. They are unprofessional men, and as a rule are local shop-keepers. Without any preliminary training or legal qualifications, they are invested with all the powers enjoyed by the judges of the superior courts of law in England. They grant injunctions and hear motions for leave to plead special defences, and issue orders to hold to bail. The position is much sought after, because it has some small emoluments attached to it, and still more because the holder of it is entitled to be called "The Honorable Mr. Justice."